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ALEXANDER L. STEVENS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CENTRAL FLORIDA ENTERPRISES, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
COWLES BROADCASTING, INC., COWLES
COMMUNICATIONS, INC., NATIONAL BLACK
MEDIA COALITION,

Respondents

APPENDIX

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**CENTRAL FLORIDA ENTERPRISES,
INC., Appellant,**

v.

**FEDERAL COMMUNICATIONS
COMMISSION, Appellee,**

**Cowles Broadcasting, Inc. and Cowles
Communications, Inc., Intervenors.**

**NATIONAL BLACK MEDIA COALITION, et al.,
Appellants,**

v.

**FEDERAL COMMUNICATIONS
COMMISSION, Appellee,**

**Cowles Broadcasting, Inc., Cowles Communications, Inc.,
and Central Florida Enterprises, Inc., Intervenors.**

Nos. 81-1795, 81-1796.

**United States Court of Appeals,
District of Columbia Circuit.**

Argued 28 April 1982.

Decided 13 July 1982.

Appeal was taken from an order of the Federal Communications Commission denying an application for a construction permit for a new commercial television station and granting the mutually exclusive application for renewal of the license. The Court of Appeals, 598 F.2d 37, vacated and remanded. On remand, the Commission adopted a new policy for comparative renewal proceedings and set forth its weighing of the factors involved. The applicant for a construction permit appealed. The Court of Appeals, Wilkey, Circuit Judge, held that the new standard of the FCC, that renewal expectancy is a factor to be weighed with all other factors and, the better the past record, the greater the renewal expectancy "weight," is within the meaning of the governing statute and, further, the Commission properly applied the standard in weighing the factors involved.

Affirmed.

1. Telecommunications

Policy of Federal Communications Commission in determining whether to renew license for television station of weighing renewal expectancy with all other factors and, the better the past record, the better the renewal expectancy "weight," is permissible. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

2. Telecommunications

Standard of Federal Communications Commission for purpose of determining television station's application for renewal of license that renewal expectancy is factor to be weighed with all other factors and, the better the past record, the greater the renewal expectancy "weight," is valid insofar as it is for benefit of broadcast consumers, not for incumbent broadcasters. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

3. Telecommunications

Federal Communications Commission was painstaking and explicit in its balancing of television broadcaster's in its balancing of television broadcaster's meritorious past record and factors weighing against renewal of broadcaster's license and, therefore, decision to renewal license was proper. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

4. Telecommunications

In Federal Communications Commission's weighing of factors in favor of and against renewal of television broadcaster's license, the scale mid-mark must be neither the factors themselves, nor the interests of the broadcasting industry, nor some other secondary or artificial construct, but rather the intent of Congress, which is to say the interests of the listening public. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

Appeal from an Order of the Federal Communications Commission.

Joseph F. Hennessey, Washington, D.C., with whom Mary C. Albert and Lee G. Lovett, Washington, D.C., were on the brief for Central Florida Enterprises, Inc., appellant in No. 81-1795 and intervenor in No. 81-1796.

Jeffrey H. Olson, Washington, D.C. for appellants, National Black Media Coalition, et al., in No. 81-1796.

Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., Washington, D.C., with whom Stephen A. Sharp, Gen. Counsel, David Silberman, Counsel, F.C.C., Washington, D.C., were on the brief, for appellee.

Robert A. Marmet, Washington, D.C., with whom Harold K. McCombs, Jr., Washington, D.C., was on the brief, for intervenors, Cowles Broadcasting, Inc., et al., in Nos. 81-1795 and 81-1796.

Henry Geller, Washington, D.C., was on the brief for amicus curiae, Henry Geller, urging reversal.

Earle K. Moore and Donna A. Demac, New York City, were on the brief, for amicus curiae, Office of Communications of the United Church of Christ, urging reversal of the FCC decision denying standing to intervene to the National Black Media Coalition.

Before ROBINSON, Chief Judge, WILKEY, Circuit Judge, and FLANNERY,* District Judge for the District of Columbia.

Opinion for the Court filed by Circuit Judge WILKEY.
WILKEY, Circuit Judge:

This case involves a license renewal proceeding for a television station. The appeal before us is taken from a new decision¹ by the Federal Communications Commission ("FCC" or "the Commission") after our opinion in *Central*

*Sitting by designation pursuant to 28 U.S.C. §292(a) (1976).

¹*Cowles Broadcasting, Inc.*, 86 F.C.C.2d 993 (1981). The proceedings prior to this new decision are at 60 F.C.C.2d 372 (1976), *reconsideration denied and clarified*, 62 F.C.C.2d 953 (1977), *reconsideration denied*, 40 Rad. Reg. 2d 1627 (1977), *vacated and remanded sub nom. Central Fla. Enters v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957, 99 S.Ct. 2189, 60 L.Ed.2d 1062 (1979).

*Florida Enterprises v. FCC (Central Florida I)*² vacated the Commission's earlier orders involving the present parties. The FCC had granted the renewal of incumbent's license, but we held that the Commission's fact-finding and analysis on certain issues before it were inadequate, and that its method of balancing the factors for and against renewal was faulty. On remand, while the FCC has again concluded that the license should be renewed, it has also assuaged our concerns that its analysis was too cursory and has adopted a new policy for comparative renewal proceedings which meets the criteria we set out in *Central Florida I*. Accordingly, and with certain caveats, we affirm the Commission's decision.³

The factual background and legal issues involved in this case were discussed at length in our earlier opinion and can be summarized briefly here. Central Florida Enterprises has challenged the FCC's decision to renew Cowles Broadcasting's license to operate on Channel 2 in Daytona Beach, Florida. In reaching a renewal/nonrenewal decision, the FCC must engage in a comparative weighing of pro-renewal considerations against anti-renewal considerations. In the case here, there were four considerations potentially cutting against Cowles: its illegal move of its main studio, the involvement of several related companies in mail fraud, its ownership of other communications media, and its relative (to Central Florida) lack of management-ownership integration. On the other hand, Cowles' past performance record was "superior," *i.e.*, "sound, favorable and substantially above a level of

²598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957, 99 S. Ct. 2198, 60 L. Ed. 2d 1062 (1979).

³National Black Media Coalition (NMBC), et al., challenge the Commission's denial of their petition to intervene. (The Commission instead accepted and considered NMBC's pleading as amicus briefs.) However, we need not resolve the issue of NMBC's standing since it raises no issues not raised by Central that would affect the disposition of the appeal, making irrelevant whether we view their submissions as those of parties or of amici.

mediocre service which might just minimally warrant renewal."⁴

In its decision appealed in *Central Florida I* the FCC concluded that the reasons undercutting Cowles' bid for renewal did "not outweigh the substantial service Cowles rendered to the public during the last license period."⁵ Accordingly, the license was renewed. Our reversal was rooted in a twofold finding. First, the Commission had inadequately investigated and analyzed the four factors weighing against Cowles' renewal. Second, the process by which the FCC weighed these four factors against Cowles' past record was never "even vaguely described"⁶ and, indeed, "the Commission's handling of the factors of this case [made] embarrassingly clear that the FCC [had] practically erected a presumption of renewal that is inconsistent with the full hearing requirement"⁷ of the Communications Act.⁸ We remand with instructions to the FCC to cure these deficiencies.

On remand the Commission has followed our directives and corrected, point by point, the inadequate investigation and analysis of the four factors cutting against Cowles' requested renewal. The Commission concluded that, indeed, three of the four merited an advantaged for Central Florida, and on only one (the mail fraud issue) did it conclude that nothing needed to be added on the scale to Central's plan or removed from Cowles'. We cannot fault the Commission's actions here.⁹

⁴62 F.C.C.2d at 955.

⁵*Id.* at 958.

⁶598 F.2d at 50.

⁷*Id.* at 51.

⁸47 U.S.C. § 309(e) (1976).

⁹See pp. 508, 509 for a discussion of the Commission's factfinding on these issues.

We are left, then, with evaluating the way in which the FCC weighed Cowles' main studio move violation and Central's superior diversification and integration, on the one hand, against Cowles' substantial record of performance on the other. This is the most difficult and important issue in this case, for the new weighing process which the FCC has adopted will presumably be employed in its renewal proceedings elsewhere. We therefore feel that it is necessary to scrutinize carefully the FCC's new approach, and discuss what we understand and expect it to entail.¹⁰

For some time now the FCC has had to wrestle with the problem of how it can factor in some degree of "renewal expectancy" for a broadcaster's meritorious past record, while at the same time undertaking the required¹¹ comparative evaluation of the incumbent's probable future performance versus the challenger's. As we stated in *Central Florida I*, "the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be."¹² And it has been intimated—by the Supreme Court in *FCC v. National Citizens Committee for Broadcasting (NCCB)*¹³ and by this court in *Citizens Communications Center v. FCC*¹⁴ and *Central Florida*

¹⁰As we said in *Central Florida I*, "This may well be a typical comparative renewal case, hence the careful scrutiny we give the Commission's procedure and rationale herein." 598 F.2d at 40.

¹¹See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333, 66 S.Ct. 148, 151, 90 L.Ed. 108 (1945); *Central Florida I*, 598 F.2d at 41-42; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed. 2d 701 (1971); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1211 (D.C.Cir. 1971), clarification granted, 463 F.2d 822 (1972).

¹²598 F.2d at 55. See also *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 806, 98 S. Ct. 2096, 2117, 56 L.Ed. 2d 697 (1978); *Citizens*, 447 F.2d at 1208.

¹³436 U.S. 775, 782, 782-83, n.5, 805-07, 98 S.Ct. 2096, 2105, 2106, n.5, 2117-18, 56 L.Ed. 2d 697 (1978).

¹⁴447 F.2d 1201, 1213 and n.35 (D.C. Cir. 1971), clarification granted, 463 F.2d 822 (1972).

¹⁵—that some degree of renewal expectancy is permissible. But *Citizens and Central Florida I* also indicated that the FCC has in the past impermissibly raised renewal expectancy to an irrebutable presumption in favor of the incumbent.

[1] We believe that the formulation by the FCC in its latest decision, however, is a permissible way to incorporate some renewal expectancy while still undertaking the required comparative hearing. *The new policy, as we understand it, is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy "weight."*

In our view [states the FCC], the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the "expectancy" takes the form of a comparative preference weighed against [the] other factors An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference.¹⁶

¹⁵598 F.2d at 60. See also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed. 2d 701 (1971); *Fidelity Television, Inc., v. FCC*, 515 F.2d 684, 702 (D.C. Cir.), cert. denied, 423 U.S. 926, 96 S. Ct. 271, 46 L.Ed. 2d 253 (1975).

¹⁶86 F.C.C. 2d at 1012. The continuum approach adopted seems foreshadowed by *Citizens*, 447 F.2d at 1213.

We note that there is some confusion between the Commission's pleadings and the Commission's decision as to whether the main studio move violation was weighed against the renewal expectancy, or diminished the renewal expectancy to begin with. Compare, e.g., Brief for the FCC at 8, 14-15, 27 with 86 F.C.C.2d at 1012-13, 1015-18. An analysis of this hypertechnical issue would be relevant only were we to concede that it matters when the various factors are weighed, but this sort of timing should not, must not, be critical. See also note 31 *infra*. The merit or lack of merit in the incumbent's record—and the degree of renewal expectancy to which he is thereby entitled—and all the other

This is to be contrasted with Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*,¹⁷ where "[o]nly unusually good records have relevance."¹⁸

If a stricter standard is desired by Congress, it must enact it. We cannot: the new standard is within the statute.

[2] The reasons given by the Commission for factoring in some degree of renewal expectancy are rooted in a concern that failure to do so would hurt broadcast consumers.

The justification for a renewal expectancy is three-fold. (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it *might even deprive the community of an acceptable service and replace it with an inferior one.* (2) Licensees should be encouraged through the likelihood of renewal to make investments to *ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded.* (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry especially considering the large number of group owners. *We cannot readily*

factors are all to be weighed, all at once, all with an eye toward the public interest. Nothing is removed from the scales until the balance is struck. Again, we are convinced the Commission acted properly in this case. See, e.g., 86 F.C.C.2d at 1015-18.

¹⁷1 F.C.C.2d 393 (1965). We stated in *Central Florida I*, 598 F.2d at 56, that the "Commission may not, comfortably with the hearing mandate of [47 U.S.C. § 309(e) (1976)], practically abandon the 1965 criteria without providing an alternate scheme affording a thorough and intelligible comparison." For the reasons stated in this opinion, we believe the new scheme to afford such a comparison.

¹⁸86 F.C.C.2d at 1012 n.91.

*conclude that such a restructuring could service the public interest.*¹⁹

*We are relying, then, on the FCC's commitment that renewal expectancy will be factored in for the benefit of the public, not for incumbent broadcasters.*²⁰ In subsequent cases we must judge the faithfulness of the FCC to that commitment, for, as the Supreme Court has said, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"²¹ citing its earlier statement that "[p]lainly it is not the purpose of the [Communications] Act to protect a license against competition but to protect the public."²² Then Circuit Judge Burger, as a member of this court, wrote:

A broadcasters seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened with enforceably public obligations After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.²³

As we concluded in *Central Florida I*, "[t]he only legitimate fear which should move [incumbent] licensees is the fear of

¹⁹*Id.* at 1013 (emphasis added). Note that each of these factors was cited by the Supreme Court in *NCCB*, 436 U.S. at 805, 807, 809, 98 S.Ct. at 2117, 2118, 2119.

²⁰This parallels, for instance, the ICC's mandate. See, e.g., *May Trucking Co. v. United States*, 593 F.2d 1349, 1356 (D.C. Cir. 1979) ("Congress designed the Interstate Commerce Act to benefit the people, not to create protected monopolies for those who profess to serve the public" (footnote omitted).) Our antitrust laws similarly dictate that competition—and, thereby, consumers—are to be protected rather than competitors. See generally R. Bork, *The Antitrust paradox* (1978).

²¹*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969) (citations omitted).

²²*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S. Ct. 693, 697, 84 L.Ed. 869 (1940).

²³*Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

their own substandard performance, and that would be all to the public good."²⁴

There is a danger, of course, that the FCC's new approach could still degenerate into precisely the sort of irrebuttable presumption in favor of renewal that we have warned against. But this did not happen in the case before us today, and our reading of the Commission's decision gives us hope that if the FCC applies the standard in the same way in future cases, it will not happen in them either. The standard is new, however, and much will depend on how the Commission applies it and fleshes it out. Of particular importance will be the definition and level of service it assigns to "substantial" — and whether that definition is ever found to be "opaque to judicial review,"²⁵ "wholly unintelligible,"²⁶ or based purely on "administrative 'feel.'"²⁷

[3] In this case, however, the Commission was painstaking and explicit in its balancing. The Commission discussed in quite specific terms, for instance, the items it found impressive in Cowles' past record. It stressed and

²⁴598 F.2d at 61-62.

²⁵*Central Florida I*, 598 F.2d at 50.

²⁶*Id.* at 59.

²⁷*Id.* at 50 (quoting earlier proceeding, 60 F.C.C. 2d 372, 422 (1976)). We think it would be helpful if at some point the Commission defined and explained the distinctions, if any, among: substantial, meritorious, average, above average, not above average, not far above average, above mediocre, more than minimal, solid, sound, favorable, not superior, not exceptional, and unexceptional—all terms used by the parties to describe what the FCC found Cowles' level of performance to have been. We are especially interested to know what the standard of comparison is in each case. "Average" compared to all applicants? "Mediocre" compared to all incumbents? "Favorable" with respect to the FCC's expectations? We realize that the FCC's task is a subjective one, but the use of imprecise terms needlessly compounds our difficulty in evaluating what the Commission has done. We think we can discern enough to review intelligently the Commission's actions today, but if the air is not cleared or, worse, becomes foggier, the FCC's decisionmaking may again be adjudged "opaque to judicial review."

listed numerous programs demonstrating Cowles' "local community orientation" and "responsive[ness] to community needs," discussed the percentage of Cowles' programming devoted to news, public affairs, and local topics, and said it was "impressed by [Cowles'] reputation in the community. Seven community leaders and three public officials testified that [Cowles] had made outstanding contributions to the local community. Moreover, the record shows no complaints" The Commission concluded that "Cowles' record [was] more than minimal," was in fact " 'substantial,' *i.e.*, 'sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.' "²⁸

The Commission's inquiry in this case did not end with Cowles' record, but continued with a particularized analysis of what factors weighed against Cowles' record, and how much. The FCC investigated fully the mail fraud issue.²⁹ It discussed the integration and diversification disadvantages

²⁸86 F.C.C.2d at 1006-08 (quoting earlier proceeding, 62 F.C.C.2d at 955-56).

²⁹The Commission concluded on the mail fraud issue that the subsidiaries involved in the mail fraud and Cowles "are linked only by their relationship with their common parent.

The broadcast facilities were not used to promote mail fraud and there was not integration of operating personnel between the [subsidiaries involved in mail fraud] and broadcast subsidiaries. Consequently, we adhere to our conclusion that the activities of the [former] *do not portend Cowles' likely future performance* as a broadcast licensee. Therefore, neither disqualification nor a comparative demerit is warranted.

86 F.C.C.2d at 1002 (emphasis added). The Commission also found that there was no basis to conclude that the principal common officers of Cowles and the implicated subsidiaries participated in or encouraged any misconduct, and that the mail fraud inquiry had not been curtailed in any significant way, *id.* 998-1004 — two other reservations we had in *Central Florida I*, 598 F.2d at 52. We think the Commission's findings here are adequately supported.

of Cowles and conceded that Central had an edge on these issues — “slight” for integration, “clear” for diversification.³⁰ But it reasoned that “structural factors such as [these] — of primary importance in a new license proceeding—should have lesser weight compared with the preference arising from substantial past service.”³¹ Finally,

³⁰86 F.C.C. 2d at 1009-10.

³¹*Id.* at 1015. The Supreme Court upheld a similar decision by the FCC to weigh diversification more heavily for prospective, as opposed to existing, licensees. *NCCB*, 436 U.S. at 803-809, 98 S.Ct. at 2116-2119. Thus, “diversification will be a relevant but somewhat secondary factor.” *Id.* at 809, 98 S.Ct. at 2119. See also *Citizens*, 447 F.2d at 1208-09 n. 23.

The FCC argues that diversification and integration should not be given “heavy weight in the comparative renewal context” since “[c]hallengers could easily structure their proposals to be superior to the incumbent’s,” resulting in possible “substantial restructuring of the industry with possible disruptions of service” and a loss of “incentive to provide quality programming.” 86 F.C.C.2d at 1016.

Here we have a caveat. We do not read the Commission’s new policy as *ignoring* integration and diversification considerations in comparative renewal hearings. In its brief at page 6 the Commission states that “an incumbent’s meritorious record should outweigh in the comparative renewal context a challenging applicant’s advantages under the structural factors of integration and diversification.” *Ceteris paribus*, this may be so — depending in part, of course, on how “meritorious” is defined. But where there are weights on the scales other than a meritorious record on the one hand, and integration and diversification on the other, the Commission must afford the latter two some weight, since while they alone may not outweigh a meritorious record they may tip the balance if weighted with something else. See *Citizens*, 447 F.2d at 1208-09 n.23.

That, of course, is precisely the situation here, since the main studio move violation must also be balanced against the meritorious record. The Commission may not weigh the antirenewal factors separately against the incumbent’s record, eliminating them as it goes along. It must weigh them all simultaneously. See note 16 *supra*. We are convinced, however, despite some ambiguous passages like the one just quoted in the preceding paragraph, that the Commission has followed the correct procedure here. See, e.g., 86 F.C.C.2d at 1018. Thus the Commission’s conclusion that diversification and integration are to be

with respect to the illegal main studio move, the FCC found that "license misconduct" in general "may provide a more meaningful basis for preferring an untested challenger over a proven incumbent."³² The Commission found, however, that here the "comparative significance of the violation" was diminished by the underlying facts:

Cowles did not actually move a studio away from Daytona Beach. It maintained two studios, one of which gradually became somewhat superior to the other. Thus, while a violation of the rule technically occurred, Cowles demonstrated no tendency to flout Commission rules or *disserve the community of license*.³³

The FCC concluded that "the risk to the public interest posed by the violation seems small when compared to the actuality of depriving Daytona Beach of Cowles' tested and acceptable performance."³⁴

Having listed the relevant factors and assigned them weights, the Commission concluded the Cowles' license should be renewed. We note, however, that despite the finding that Cowles' performance was " 'substantial,' i.e., 'sound, favorable and substantially above a level of mediocre service,' "³⁵ the combination of Cowles' main studio rule violation and Central's diversification and integration advantages made this a "close and difficult case."³⁶ Again, we trust that this is more evidence that the Commission's weighing did not, and will not, amount to automatic renewal for incumbents.

given "lesser weight" than renewal expectancy does not mean that they were or will be given *no* weight. The relative weight to be given these factors will vary, depending on how much or how little diversification or integration is at stake. Here, as stated in the text, the Commission did consider the degree of Central's integration advantage ("slight") and diversification advantage ("clear"). 86 F.C.C. 2d at 1009-10.

³²866 F.C.C. 2d at 1017.

³³*Id.* at 1005-06 (emphasis added). See also *id.* at 1017.

³⁴*Id.* at 1017.

³⁵*Id.* at 1006 (quoting earlier proceeding, 62 F.C.C. 2d at 955-56).

³⁶*Id.* at 1018.

We are somewhat reassured by a recent FCC decision granting, for the first time since at least 1961,³⁷ on *comparative* grounds the application of the challenger for a radio station license and denying the renewal application of the incumbent licensee.³⁸ In that decision the Commission found that the *incumbent deserved no renewal expectancy* for his past program record and that his application was inferior to the challenger's on comparative grounds. Indeed, it was the *incumbent's* preferences on the diversification and integration factors which were overcome (there, by the challenger's superior programming proposals and longer broadcast week). The Commission found that the incumbent's "inadequate [past performance] reflects poorly on the *likelihood of future service in the public interest.*" Further, it found that the incumbent had no "legitimate renewal expectancy" because his past performance was neither "meritorious" nor "substantial."³⁹

[4] We have, however, an important caveat. In the Commission's weighing of factors the scale mid-mark must be neither the factors themselves, nor the interests of the broadcasting industry, nor some other secondary and artificial construct, but rather the intent of Congress, which is to say the interests of the listening public. All other doctrine is merely a means to this end, and it should not become more. If in a given case, for instance, the factual situation is such that the denial of a license renewal would not determine renewal expectancy *in a way harmful to the*

³⁷Letter of Daniel M. Armstrong, FCC Associate General Counsel, to George A. Fisher, Clerk, U.S. Court of Appeals, District of Columbia Circuit (May 4, 1982) (hereinafter "Letter of Daniel M. Armstrong"). See also *Central Florida I*, 598 F.2d at 61.

³⁸*In re Applications of Simon Geller and Grandbanke Corp.*, FCC Docket Nos. 21104-05 (Released 15 June 1982). We intimate no view at this time, of course, on the soundness of the Commission's decision there; we cited it only as demonstrating that the Commission's new approach may prove to be more than a paper tiger.

³⁹*Id.* at 15, 20-21 (emphasis added).

public interest, then renewal expectancy should not be invoked.⁴⁰

Finally, we must note that we are still troubled by the fact that the record remains that an incumbent *television* licensee has *never* been denied renewal in a comparative challenge.⁴¹ American television viewers will be reassured, although a trifle baffled, to learn that even the worst television stations—those which are, presumably, the ones picked out as vulnerable to a challenge⁴²—are so good that they never need replacing. We suspect that somewhere, sometime, somehow, some television licensee *should* fail in a comparative renewal challenge, but the FCC has never discovered such a licensee yet. As a court we cannot say that it must be Cowles here.

We hope that the standard now embraced by the FCC will result in the protection of the public, not just incumbent licensees. And in today's case we believe the FCC's application of the *enw* standard was not inconsistent with the Commission's mandate. Accordingly the Commission's decision is

Affirmed.

⁴⁰Thus, the three justifications given by the Commission for renewal expectancy, p. 507 *supra*, should be remembered by the FCC in future renewal proceedings and, where these justifications are in a particular case attenuated, the Commission ought not to chant "renewal expectancy" and grant the license.

⁴¹See Letter of Daniel M. Armstrong, *supra* note 37; *Central Florida I*, 598 F.2d at 61; Letter of Joseph F. Hennessey, Counsel for Central Florida, to George A. Fisher, Clerk, U.S. Court of Appeals, District of Columbia Circuit (May 17, 1982).

⁴²Counsel for the FCC conceded at oral argument, "I grant you, [competitors] wouldn't challenge the [incumbent] they thought was exceptional or far above average." The dissent from the Commission's decision declared it a "readily apparent fact that competing applicants file against only the ne'er-do-wells of the industry." 86 F.C.C.2d at 1055 n.99.

**United States Court of Appeals
For The District of Columbia Circuit**

NO. 81-1795

September Term, 1982

**Central Florida Enterprise,
Inc.,
Appellant**

ARGUED 4-28-82

v.

**United States Court of Appeals
for the District of Columbia Circuit**

**Federal Communications Commission,
Appellee**

FILED October 15, 1982

.....
**Cowles Broadcasting, Inc. and
Cowles Communications, Inc.,
Intervenor**

**GEORGE A. FISHER
CLERK**

.....
And consolidated case No. 81-1796

**BEFORE: Robinson, Chief Judge; Wilkey, Circuit Judge
and Thomas A. Flannery*, Judge, United States
District Court for the District of Columbia**

O R D E R

**On consideration of appellant's petition for rehearing,
filed August 27, 1982, it is**

**ORDERED by the Court that the aforesaid petition is
denied.**

Per Curiam

FOR THE COURT:

**George A. Fisher,
Clerk**

BY:

**Robert A. Bonner
Chief Deputy Clerk**

***Sitting by designation pursuant to Title 28 U.S.C. §292(c).**

**Remand from Court of Appeals
Renewal, Applicant v. New Applicant
Studio Location, Main**

Application for renewal of TV license granted and mutually exclusive application denied. Case remanded to Commission and earlier grant of renewal vacated. Renewal applicant received no demerit for mail fraud committed by subsidiaries. Renewal applicant's substantial past broadcast record outweighed competing applicant's advantages under diversification and integration criteria.

Docket No. 19168

FCC 81-280

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Applications of:

**COWLES BROADCASTING, INC. (WESH-TV)
Daytona Beach, Florida**

For Renewal of License

**CENTRAL FLORIDA ENTERPRISES, INC.
Daytona Beach, Florida**

For Construction Permit

Docket No. 19168

File No. BRCT—354

Docket No. 19170

File No. BPCT—4346

Robert A. Marmet and Harold K. McCombs, Jr., on behalf of Cowles Broadcasting, Inc.; Joseph F. Hennessey on behalf of Central Florida Enterprises, Inc.; Jeffrey H. Olson on behalf of the Florida State Conference of Branches of the National Association for the Advancement of Colored People, Charles Cherry, the National Black Media Coalition, and Rosie Laster amicus curiae; and Charles W. Kelley, David Silberman and Arthur I. Steinberg on behalf of the Chief, Broadcast Bureau.

Decision

(Adopted: June 16, 1981; Released: June 19, 1981)

BY COMMISSIONER ANNE P. JONES FOR THE COMMISSION: CHAIRMAN FOWLER NOT PARTICIPATING. COMMISSIONER FOGARTY DISSENTING AND ISSUING A STATEMENT.

1. Before the Commission for consideration is a renewal application filed by Cowles Broadcasting, Inc. (Cowles) and a mutually exclusive application for a construction permit filed by Central Florida Enterprises, Inc. (Central). This proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit, which vacated our grant of Cowles' renewal application.

1. Background

2. Cowles, the licensee of WESH-TV, Daytona Beach, Florida (NBC, Ch. 2), was designated for consolidated hearing with the mutually exclusive application of Central.¹ The Commission specified engineering issues against Cowles as well as issues to determine whether Cowles (a) had moved its main studio without prior Commission approval and (b) was qualified to remain a Commission licensee in light of allegations that Cowles' parent corporation, Cowles Communications, Inc. (CCI), was involved in mail fraud through five wholly owned subsidiaries engaged in the sale of magazine subscriptions. Engineering issues and financial qualifications issues were designated against Central.

3. The Commission, affirming in most material respects and ALJ's initial Decision,² granted renewal of Cowles' license and denied Central's competing application on comparative grounds.³ Cowles was found to have violated

¹Order, FCC 71-237, released March 10, 1971.

²Cowles Florida Broadcasting, Inc., 78 FCC 2d 500 (1973).

³Cowles Florida Broadcasting, Inc., 60 FCC 2d 372 (1976), recon. denied and clarified, 62 FCC 2d 953, recon. denied, 40 RR 2d 1627 (1977).

the main studio rule by moving its main studio without authorization from just outside Daytona Beach, the city of license, to just outside Orlando. We agreed with the ALJ, however, that the consequences of the move were mitigated by the fact that (1) the move was not made in deliberate defiance of the Commission's rules, and (2) service to Daytona Beach was not substantially downgraded. As a result, we imposed only a slight demerit against Cowles. We declined to impose a demerit against Cowles because CCI's five magazine subsidiaries were found to have engaged in mail fraud. We found that no connection existed between Cowles and the magazine subsidiaries beyond common ownership. Thus, there was no justification for visiting the sins of the magazine subsidiaries through the parent CCI and back down the corporate ladder to Cowles.⁴

4. Turning to the standard comparative issue, we acknowledged that Central was superior to Cowles under both the integration and diversification criteria. However, we concluded these advantages were minimal. As to diversification, we noted that Cowles' outside media interests were distant from Florida, that no degradation of service to Daytona Beach had resulted from this common ownership, and that Cowles accorded management autonomy to WESH-TV. As to integration, we noted that Central's proposal, although including local residents and minorities, was weak, and again noted that Cowles accorded management autonomy to WESH-TV. In view of foregoing, we gave decisive weight to Cowles' past performance, which we characterized as "substantial" *i.e.* "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal."⁵

⁴Neither Cowles nor Central received a preference or demerit under the engineering issues nor waiver of the Commission's short-spacing rules. Additionally the Commission found Central financially qualified.

⁵62 FCC 2d at 955.

5. The United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Commission's Decision.⁶ The court expressed dissatisfaction with both the Commission's handling of specific issues and also with what the court perceived as an "inchoate" policy in comparative renewal proceedings. The court disagreed with the factors the Commission considered to mitigate Cowles' violation of the main studio rule, and directed the Commission to reevaluate the significance of the violation. The court also directed the Commission to make further findings concerning the common officers of Cowles and the magazine subsidiaries to determine whether conclusions under the mail fraud issues should be modified, and directed the Commission to consider whether further evidentiary hearings on the mail fraud issue were needed.

6. As to comparative considerations, the court disapproved of the reasoning the Commission used in assessing Central's integration and diversification advantages — particularly reliance on "management autonomy" — and ordered the Commission to reconsider these points. Moreover, the court expressed confusion over the manner in which Cowles' past broadcast record had been weighed in the comparative evaluation. In a Supplemental Order, the court told the Commission to explain clearly the rationale for and the significance of the "renewal expectancy" arising from past meritorious broadcast service.⁷ After remand, the Commission solicited

⁶*Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *reh. en banc denied and modified*, 598 F.2d 58 (D.C. Cir.), *pet. for cert. dismissed*, 441 U.S. 957 (1979).

⁷Following announcement of the Court of Appeals' decision, Cowles and Central filed a stipulation of dismissal proposing a settlement agreement with the Court of Appeals, and the Commission filed a Motion for Modification of Judgment requesting the court to delete the comparative aspects of the proceeding. In a related motion Cowles requested dismissal of its Petition for Certiorari. That latter motion was granted by the Supreme Court on May 17, 1979, and on June 19, 1979, the Court of Appeals denied the dismissal motion and the Motion for Modification of Judgment and issued its mandate.

the parties' views on what action it should take in light of the Court of Appeals' mandate.⁸

II. Proceedings on Remand

7. Pursuant to the court's directive, we have reconsidered our previous Decision and have concluded that while the reasoning we employed may have been open to question, the result was correct. Therefore, we will grant Cowles' application for renewal of license to operate WESH-TV and deny Central's mutually exclusive application for a construction permit.

8. As an initial matter, we have considered the issues having potential impact on Cowles' basic qualifications: the mail fraud issue and the main studio move issue. We have made further findings regarding the mail fraud issue based on the existing record and conclude that they do not warrant any demerit against Cowles. We also conclude that no further evidentiary hearings are necessary in this regard. As to the main studio move issue, we have reassessed the seriousness of this violation and conclude that a comparative demerit is warranted.

9. This brings us to the standard comparative criteria and the overall comparative analysis. As before, we believe that Central is entitled to slight preferences over Cowles under the diversification and integration criteria. However, these preferences, as well as the demerit against Cowles under the main studio move issue, are counterbalanced by the preference due Cowles for its meritorious past broadcasting record. Such a preference is necessary to protect the public from loss of an acceptable service in exchange for an untested and undistinguished proposal, to promote investment in quality service, and to avoid haphazard restructuring of the communications industry. In reaching this conclusion — that a preference may be awarded on the basis of a meritorious past record—we have

⁸Order, FCC 79-415, released July 6, 1979.

articulated a new policy for comparative renewals. However, we believe it is one that strikes a more realistic balance between the promise of a challenger and the continuation of meritorious service by an incumbent than that permitted by rigid adherence to the traditional comparative criteria.

10. And finally, we have considered the numerous interlocutory pleadings filed by the parties and by prospective intervenors after remand. We conclude that a petition to intervene is without merit, that petitions to enlarge issues against Cowles' should be denied, that several petitions for leave to amend applications should be granted for reporting purposes, and that other pleadings should be dismissed as either moot or irrelevant.

A. Issues Remanded—Potentially disqualifying issues⁹

Mail Fraud Issue

11. The mail fraud issue was designated in response to the fact that five subsidiaries of CCI (Cowles' parent corporation) pleaded *nolo contendere* to 50 counts of mail fraud and paid \$50,000 in fines, and that CCI and the five subsidiaries entered into a consent decree prohibiting them from engaging in certain fraudulent activities related to selling magazine subscriptions. The five subsidiaries had engaged in the sale of "paid during service" (PDS) magazine

⁹Central additionally seeks to reopen several collateral matters, all of which were previously considered by the Commission and none of which were mentioned by the Court of Appeals. These are: (1) the "Martinelli incident" (60 FCC 2d at 406-07), (2) Central's "stout denial" theory (*Id.* at 398), (3) failure to inquire into the amount of funds transferred between CCI and its subsidiaries (*Id.* at 424, (denying exception 91)) and (4) alleged improper upgrading of Cowles' application (*Id.* at 427, (denying exceptions 244-50 and 252-54)). In our view, the Commission's original treatment of these issues is entirely adequate and Central has advanced no specific reason for reconsideration. Thus, no further inquiry into these areas is warranted.

subscriptions.¹⁰ Investigations of the PDS business by the Postal Service, the Federal Trade Commission (FTC), and several states resulted in the *nolo* plea and consent decree, both filed in the United States District Court for the Southern District of Iowa, and similar civil consent decrees reached with the FTC and approved by courts in Wisconsin, California, Michigan, and Pennsylvania.¹¹

12. The Commission¹² found that CCI had acquired the PDS subsidiaries between 1955 and 1962 and that their operations had become established by 1967-69. A CCI Vice President and Director, Lester Suhler, was the President of each of the PDS subsidiaries, and each subsidiary was staffed by CCI employees. These employees in turn dealt with "franchise dealers" who were, at least in form, independent contractors. Employees of the franchise dealers did the actual magazine selling and engaged in the fraudulent conduct. The relationship between CCI and PDS subsidiaries was close with CCI guaranteeing large loans to the PDS subsidiaries, furnishing office buildings, keeping consolidated tax returns, financial reports and commingling revenues.

13. By 1968, Gardner Cowles, then Chairman of the Board of CCI, learned of problems with improper sales practices in the PDS subsidiaries and so informed CCI's Executive Committee. A code of behavior was adopted but

¹⁰Under the paid during service system, the customer does not pay for the subscription in cash but instead pays installments over the life of the subscription. Several types of fraudulent sales practices were typical of paid during service operations. These included misrepresenting the terms of the subscription contract holding out the solicitor as being connected with a charity, or representing the subscription as including a free prize. Dealers also concealed the fact that the consumer was signing a binding contract and that the consumer had a right to cancel the contract. Dealers also used hard sell tactics including personal hardship pleas. Moreover, dealers used various coercive collection practices.

¹¹The consent decrees were voluntarily entered into by the parties, are prospective in effect, and do not constitute an admission of guilt.

¹²78 FCC 2d at 519-31.

its enforcement was inconsistent. Former franchise dealers testified that corporate supervision consisted of encouraging sales and implicitly condoning improper practices. The PDS companies routinely reviewed sales and could have controlled the franchise dealers by withholding essential loans. By 1969, after learning of governmental investigations into the PDS field, CCI established a special task force to investigate the PDS subsidiaries and began ending their operation. During the next year negotiations with the Justice Department resulted in the various consent decrees. By 1971 all PDS operations were ended.

14. The Commission concluded¹³ that, while the existence of fraud had not been proven at the hearing by direct evidence, circumstantial evidence demonstrated fraud perpetrated by the PDS subsidiaries and that CCI was undoubtedly aware of it. However, we declined to impose a demerit against Cowles because (1) during the period in question Cowles had established a good broadcast record, (2) no connection between Cowles and the PDS subsidiaries existed beyond common ownership, and (3) U.S. Attorney Allen Donielson testified that there was no substantial criminal case against CCI.¹⁴

15. The Court of Appeals was troubled by two aspects of the Commission's treatment of the mail fraud issue.¹⁵ First, the court noted that neither the Commission nor the ALJ made findings with respect to the significance of common principal officers of the PDS and broadcast subsidiaries. At least two individuals Marvin C. Whatmore and John F. Harding, held such positions. Second, the court expressed concern that the inquiry into the fraudulent PDS activities may have been prematurely curtailed. Specifically, the court directed the Commission to review rulings by the ALJ which (1) quashed subpoenas requiring

¹³60 FCC 2d 403-406.

¹⁴CCI was a part to the civil consent decrees but not to the criminal proceedings.

¹⁵598 F.2d at 52.

testimony of two postal inspectors involved in the mail fraud investigation, and (2) terminated inquiry into the investigations by the FTC and various states.

Common Principal Officers

16. Pursuant to the court's mandate,¹⁶ we now make further findings and conclusions concerning common principal officers¹⁷ of Cowles and the PDS subsidiaries.

17. Marvin C. Whatmore served as the Treasurer of Cowles¹⁸ and the President, Chief Executive Officer, Director, and Executive Committee member of CCI. He held the following positions with the PDS subsidiaries: Senior Vice President and Director of Home Reader Service, Inc., a Vice President, Treasurer and Director of Mutual Readers League, Inc., a Vice President and

¹⁶We agree with the Broadcast Bureau that the court's remand does not necessarily imply that further hearings must be held on this matter. If the Commission finds that the existing record is sufficient to give a just result, no further hearings need be held. *Radio Carrollton*, 69 FCC 2d 1138, *recon. granted in part sua sponte*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff'd by judgment*, No. 79-1749 (D.C. Cir. October 15, 1980), *cert. denied* 101 S. Ct. 1758 (1981). We believe the existing record here is adequate.

¹⁷We concern ourselves primarily with Marvin C. Whatmore and John F. Harding, the individuals noted by the court. Two other common officers appear less important. Merrill H. Clough served as a Vice President and Treasurer of Cowles, a Vice President, Comptroller, Director and Executive Committee member of CCI and Financial Vice President and in some cases Director of the magazine subsidiaries. BB Exh. 51A; Cowles' Comments at 4 n.5. Clough had responsibilities similar to those of Whatmore but at a lower level. Tr. 3752, 3764-65, 3777. Clough signed some minutes of PDS subsidiaries board meetings as chairman of the meetings. E.g. Central Exh. 69 at 33. Francis J. Barry was an Assistant Secretary of Cowles, CCI, and the magazine subsidiaries. BB Exh. 51A; Cowles' Reply Comments at 14 n. 9. Barry was an attorney attached primarily with the parent corporation, CCI, and concerned with general corporate legal work. Tr 4214, *see* Tr. 4182-264. Barry signed some minutes of PDS subsidiaries board meetings as Secretary (E.g., Central Exh. 72 at 29) and signed some corporate resolutions. E.g., Central Exh. 68 at 8.

¹⁸Cowles Exh. 128A.

Director of Home Reference Library, Inc., a Vice President, Treasurer, and Director of Civic Reading Club, Inc., and a Vice President and Director of Educational Book Club, Inc.¹⁹

18. Whatmore testified that his role at WESH-TV resulted from his position as chief financial officer of CCI and primarily involved setting general financial policy for the comptrollers, and receiving periodic financial statements and projects involving profit-loss, equipment, and cash control.²⁰ He stated that he received programming reports and visited Daytona Beach two or three times a year, but did not issue any programming directives.²¹ Whatmore was not involved in the day-to-day management of WESH-TV, nor in insuring the station's compliance with FCC policy.²² Whatmore was involved in some major corporate decisions involving WESH-TV. He testified that he had, on occasion, negotiated on behalf of WESH-TV, for example, in connection with brokerage agreement involving *Look* magazine,²³ and had participated in the acquisition of the station.²⁴

19. Whatmore testified to a similar role with respect to the PDS subsidiaries, which were completely separate from WESH-TV.²⁵ He stated that the PDS subsidiaries operated as independent business entities and that his role in their management was to monitor their budget and financial

¹⁹BB Exh. 51A. Whatmore signed minutes of some PDS subsidiaries board meetings as chairman of the meeting. *E.g.*, Central Exh. 68 at 1.

²⁰Tr. 2942-43. In general he concerned himself with insuring that CCI subsidiaries maintained sound business practices and with approving transfers of funds from CCI to its subsidiaries but not with the subsidiaries ordinary disbursements. Tr. 2947-48.

²¹Tr. 2943.

²²Tr. 2946-49.

²³Tr. 2939-42.

²⁴Tr. 2945-46, 2949. Whatmore also participated in the sale of broadcast properties. Tr. 2941.

²⁵Tr. 3342.

matters.²⁶ According to Whatmore, actual day-to-day management of the PDS subsidiaries was delegated entirely to Lester Suhler.²⁷ Whatmore related that once he became aware of Suhler's deficiencies as a manager, he and others took steps to clean up the PDS subsidiaries.²⁸ These steps consisted of providing Suhler with management support to enforce proper conduct and reduce his authority, auditing franchise dealers, and phasing out PDS operations.

20. John F. Harding was Secretary of Cowles.²⁹ and an Executive Vice President, General Counsel, Director, and Executive Committee member of CCI. His positions in the PDS subsidiaries were: a Vice President and Secretary of Home Reader Service, Inc. Mutual Readers League, Inc., and Home Reference Library, Inc., and a Vice President, Secretary, and Director of Civic Reading Club, Inc., and Educational Book Club, Inc.³⁰

21. Harding described himself as having, like Whatmore, a general supervisory role over WESH-TV rather than involvement in day-to-day operations.³¹ He participated in some extraordinary corporate matters — e.g., capital improvements and labor matters — read programming and other reports, and concerned himself with corporate communications law.³² He participated in the acquisition of WESH-TV.³³

²⁶Tr. 3334.

²⁷Tr. 3335-38, 3363.

²⁸Tr. 3339-41, 3350-53, 3359-63.

²⁹Cowles Exh. 128A. Harding is deceased. This fact, however, does not moot the significance of his participation. *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

³⁰BB Exh. 51A. Harding signed some minutes of PDS subsidiaries board meetings and corporate resolutions as Secretary. *E.g.*, Central Exh. 68 at 1, Central Exh. 71 at 7. He held a proxy for voting CCI stock in the PDS subsidiaries. *E.g.*, Central Exh. 68 at 5.

³¹Tr. 2847, 2876, 2883, 2886.

³²Tr. 2874-75, 2877, 2881, 2883-86, 2890, 2896-97.

³³Tr. 2883. Harding also participated in the acquisition and sale of other broadcast properties. Tr. 2850, 2868-69, 2944.

22. Harding testified that the PDS subsidiaries were autonomous entities and that information from the subsidiaries did not always reach CCI.³⁴ Day-to-day responsibility for the PDS subsidiaries' operation was Lester Suhler's responsibility.³⁵ Harding's role was that of a trouble shooter and special assignments officer; for example, he hired the PDS subsidiaries' legal counsel.³⁶ Harding testified that he had taken steps to clean up misconduct in the PDS subsidiaries.³⁷ He ascribed his role in conducting the negotiations that led to the civil and criminal decrees to his concern as CCI's chief legal officer about the effect the PDS scandal would have on CCI.³⁸ He participated in the acquisition of the PDS subsidiaries.³⁹

23. Lester Suhler, the President of the PDS subsidiaries, confirmed that he and not Whatmore or Harding had day-to-day responsibility for PDS operations.⁴⁰ Suhler reported to Whatmore and Harding and Whatmore and Harding relied on him for information.⁴¹ Although Suhler admitted that Whatmore and Harding knew of complaints about the PDS operations and had attended some meetings with franchise dealers, he insisted that Whatmore and Harding never condoned violations and that they wanted sales to be made properly.⁴² Suhler also insisted that the 1969 task force in which Whatmore and Harding participated resulted in the firing of many franchise dealers.⁴³

³⁴Tr. 3036-39, 3188, 3196.

³⁵Tr. 3176-77, 3195, 3263.

³⁶Tr. 3040-41, 3067.

³⁷Tr. 3186-90.

³⁸Tr. 3131-32, 3168-69, 3171-72.

³⁹Tr. 3139.

⁴⁰Tr. 4533. Suhler was appointed President and informed of his responsibilities by Whatmore, Harding, and Gardner Cowles. Tr. 4533-34.

⁴¹Tr. 4537, 4560.

⁴²Tr. 4549, 4566, 4568-69, 4572, 4594-95.

⁴³Tr. 4554.

24. U.S. Attorney Allen Donielson, who had responsibility for the nationwide investigation of PDS fraud, evaluated Whatmore and Harding's roles. He testified that he did not have a criminal case against CCI or its personnel, including Whatmore and Harding.⁴⁴ Donielson did not consider Whatmore and Harding to be working members of the PDS subsidiaries—*i.e.*, involved in the subsidiaries' day-to-day operation.⁴⁵

25. We believe the record clearly reflects the nature of Whatmore and Harding's positions with respect to CCI and its subsidiaries.⁴⁶ The testimony on this point is undisputed. Whatmore and Harding were essentially officers of CCI and not of the subsidiaries. Their designation as officers and directors of the subsidiaries reflects the supervision they exercised as chief financial and legal officers of CCI, rather than any role as operating officers of the subsidiaries. The status of Whatmore and Harding suggests that they were generally aware of the major features of subsidiary operation, including, in the case of the PDS operations, the existence of misconduct. However, there is no basis to conclude that either Whatmore or Harding participated in or encouraged any misconduct.

26. Functionally, the PDS subsidiaries and WESH-TV are linked only by their common relationship with CCI. The broadcast facilities were not used to promote mail fraud and there was no integration of operating personnel between the PDS and broadcast subsidiaries. Consequently, we adhere to our conclusion that the activities of the PDS subsidiaries do not portend Cowles' likely future performance as a broadcast licensee.

⁴⁴Tr. 4367-68, 4410-11, 4414.

⁴⁵Tr. 4391.

⁴⁶The roles of Clough and Barry provide further evidence of the management arrangement represented by Whatmore and Harding. Thus, their roles do not materially alter the conclusions we draw from Whatmore's and Harding's roles.

Therefore, neither disqualification nor a comparative demerit is warranted.⁴⁷

Subpoenas against Postal Inspectors.

27. Pursuant to the Court's directive we have thoroughly reviewed the quashing of the subpoenas Central sought against Gene L. Ludtke, the postal inspector in charge of the PDS investigation and William J. Cotter, the Chief Postal inspector. We conclude that quashing the subpoenas did not curtail the inquiry into the mail fraud issue in any significant way.

28. By way of background, the Postal Service moved to quash the subpoenas issued against Ludtke and Cotter, stating that the information sought involved matters contained in privileged Postal Service investigatory files.⁴⁸ The Postal Service further claimed that the FCC had no power to compel disclosure of this information but that the Postal Service would cooperate with the Commission. At a pre-hearing conference the ALJ quashed the subpoenas.⁴⁹ He noted that Ludtke and Cotter would certainly not testify absent a court order, the Postal Service was voluntarily providing information to the Broadcast Bureau, and Central had not specified genuinely useful and worthwhile

⁴⁷This case differs significantly from *RKO General, Inc.*, 78 FCC 2d 1 (1980), in which RKO was disqualified in part because of the nonbroadcast misconduct of a related corporation, General Tire and Rubber Co. Initially, it should be noted that in contrast with this case one of the independent grounds for RKO's disqualification was that the licensee had lacked candor in its representations to the Commission. Additionally, General Tire, which owned and controlled RKO, involved RKO broadcast stations in anticompetitive reciprocal trade practices. Finally, the Commission found that the non-broadcast related misconduct of General Tire, RKO's parent corporation, was far more widespread and of greater magnitude than that present here. See 78 FCC 2d at 114.

⁴⁸April 14, 1972 Letter from Charles R. Braun, Assistant General Counsel, United States Postal Service, to Hearing Examiner Chester Naumowicz.

⁴⁹Tr. 525-26.

information to be developed.⁵⁰ During a hearing conducted September 28, 1972, Ludtke was called to the stand, where he claimed privilege.

29. We believe the ALJ correctly quashed the subpoenas against the postal inspectors. Aside from our doubt that the subpoenas would be enforceable if issued, Central has not satisfied us that it seeks genuinely useful information or that it has made diligent efforts to obtain material directly from the Postal Service.

30. Investigatory files of the U.S. Postal Service are exempted from mandatory disclosure by statute.⁵¹ Postal Service rules prohibit its employees from testifying as to any matter for which such an exemption may be claimed.⁵² Thus, it is highly questionable whether the Commission could obtain enforcement of a subpoena compelling the inspectors to testify as to the mail fraud investigation if the Postal Service resisted disclosure.

31. We see no reason, however, to force the issue. We are not convinced that Central seeks genuinely useful information. When asked to specify what information it sought through subpoena, Central referred to information concerning the 50 individuals named as alleged mail fraud victims in the federal proceedings, including material sent to these individuals by the PDS franchise dealers. We agree with the ALJ that as these individuals could be approached directly there is no need to go to the Postal Service. Moreover, we do not believe these individuals could provide information probative of the crucial question before us: the possible complicity of high level corporate officials in mail fraud.

32. In any event, we are not convinced that Central has availed itself of opportunities to obtain material from the Postal Service. Postal Service rules provide for the

⁵⁰See FCC 72M-640, released May 16, 1972.

⁵¹39 U.S.C. §410(c)(6)(1976).

⁵²39 C.F.R. §265.10(b) (1980).

disclosure of investigatory information voluntarily, with some exceptions, in response to specific requests.⁵³ The record shows that Central's counsel met with a Postal Service official on April 27, 1972, and was invited to make specific requests for information in writing. Central has not indicated that the Postal Service has rebuffed any such requests. Therefore, we will not pursue this matter further.⁵⁴

Collateral proceedings

33. We have also thoroughly considered the possibility raised by the court that failure to inquire into proceedings before the FTC and state courts unduly curtailed the mail fraud inquiry. We conclude that no purpose would be served by reopening inquiry into these collateral proceedings.

34. We have consistently taken these collateral proceedings into account in considering the mail fraud issue. In our original Designation Order, the mail fraud issue was based on the federal district court pleas and pending proceedings in Wisconsin and before the FTC.⁵⁵ We also conditioned any grant to Cowles on the pending proceedings.⁵⁶ The question of whether independent inquiry into the collateral proceedings was justified came squarely before the Commission when Central moved to enlarge the mail fraud issue to take into account allegations made before the courts in several states. The Review Board correctly denied Central's motion because essentially the same alleged misconduct was involved in all the various

⁵³39 CFR §265.6(c)(1980); see also *Institute for Weight Control, Inc. v. Klassen*, 348 F. Supp. 1304 (D.N.J. 1972).

⁵⁴Central also seeks access to "the material obtained in discovery by the Broadcast Bureau in connection with the testimony of the U.S. Attorney for Des Moines, Iowa." Central's Comments at para. 47. The Bureau replies that it has searched its files and found nothing fitting that description. Broadcast Bureau's Reply Comments at 2.

⁵⁵FCC 71-237 at para. 25.

⁵⁶*Id.* at paras. 27, 29.

state and federal proceedings. Therefore, inquiry into the facts and circumstances surrounding the federal decrees would be of sufficient scope to protect the public interest.⁵⁷ As a precautionary measure, however, the Board conditioned any grant to Cowles on the outcome of the pending proceedings. The full Commission denied review of the Board's order⁵⁸ and, because all pending proceedings had terminated by then, deleted the condition in its Decision.⁵⁹

35. Central has demonstrated no reason to depart from our previous treatment of the collateral proceedings. We have no reason to believe that the collateral proceedings involve misconduct different from that which has already been the subject of evidentiary hearings before the Commission. Nor is there any indication that the collateral proceedings uncovered significant new evidence. Therefore, further inquiry is not warranted.

Main Studio Move Issue

36. The Commission affirmed the ALJ's conclusion that Cowles had violated former Section 73.613 of the Rules by locating its main studio outside of Daytona Beach, WESH-TV's community of license.⁶⁰ We concluded that WESH-TV's "main" studio in Holly Hill, just outside of Daytona Beach, was inferior to the "auxiliary studio" located at Winter Park, just outside of Orlando. Several factors led to this conclusion.⁶¹ For the single month for which record evidence was available, January 1970, a significantly greater amount of programming was produced at Winter Park. More persons were employed and hours of operation were longer at Winter Park, reception point. A majority of the station's officers had offices at Winter Park.

⁵⁷32 FCC 2d 436, 450 (Rev. Bd. 1971).

⁵⁸FCC 72-443, released May 25, 1972 at para. 1 n.2.

⁵⁹60 FCC 2d at 395 n. 21.

⁶⁰See Sections 73.1120, 73.1125, 73.1130 of the Rules.

⁶¹60 FCC at 390.

A former General Manager, Thomas Gilchrist, was fired for giving insufficient attention to Orlando. Finally, 59% of the station's physical assets were allocated to Winter Park and only 15% to Holly Hill. When we found that Cowles treated the Winter Park facilities as its principal place of business, several factors were found to have mitigated the significance of this violation.⁶² WESH-TV had provided acceptable service to Daytona Beach, the Holly Hill facility had been materially improved, substantial amounts of local programming were produced at Holly Hill, and no complaints of inadequate service were received. Moreover, the move was not the result of a deliberate corporate decision to defy the Commission's rules. The Winter Park facility was already substantially important when Cowles purchased WESH-TV. While no single decisive act tipped the balance of resources to Winter Park, the commercial lure of Orlando led to a series of changes collectively sufficient to result in a *de facto* move to Orlando. In the Commission's view, these mitigating factors made disqualification inappropriate, and did not materially detract from Cowles' substantial performance.

37. The court found the Commission's conclusion that Cowles had violated the main studio rule amply supported by the record. The court, however, felt that the slight demerit imposed was not adequately explained.⁶³ In particular, the court did not find the mitigating factors cited by the Commission persuasive.

38. In the absence of deliberate intent to flout the Commission's rules, we do not consider the violation disqualifying.⁶⁴ We agree with the court that Cowles must be assessed a demerit for its violation of the main studio rule. As the court has indicated, the fact that the move was

⁶²60 FCC 2d at 398-99.

⁶³598 F.2d at 51-52.

⁶⁴See, e.g., *Amaturo Group, Inc.*, 46 RR 2d 865 (1979); *Broadcasting Service of America*, 38 RR 2d 552 (1976); *I. B. C.*, 35 RR 2d 1551 (1975); *International Panorama TV, Inc.*, 52 FCC 2d 258 (1975); *Texas Key Broadcasters, Inc.*, 30 FCC 2d 146 (1971).

not deliberate and that no downgrading of service to Daytona Beach resulted does not eliminate the comparative significance of the violation. Nevertheless in our view, one factor continues to reduce the comparative significance of the violation. Cowles did not actually move a studio away from Daytona Beach. It maintained two studios, one of which gradually became somewhat superior to the other. Thus, while a violation of the rule technically occurred, Cowles demonstrated no tendency to flout Commission rules or disserve the community of license. We will consider the weight due this violation in discussing the overall comparative evaluation of the applicants.

B. Issues Remanded—Comparative Aspects.⁶⁵

39. At this point we shall discuss each of the comparative factors separately. We shall discuss the relative weights due the various factors in considering the overall comparative evaluation.

Cowles Broadcast Record⁶⁶

40. The Commission characterized Cowles' broadcast record during the 1966-69 license term, the first since Cowles acquired WESH-TV, as "substantial" *i.e.*, "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal."⁶⁷ "Substantial" service was to be distinguished from "exceptional" service "at the highest possible level" or

⁶⁵See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (hereinafter 1965 Policy Statement). The 1965 Policy Statement sets forth two primary criteria: "maximum diffusion of control of the media of mass communications" and "best practicable service to the public," which includes integration of ownership into management and past broadcast record. The 1965 Policy Statement, which deals with the comparison of new applicants for broadcast facilities, does not deal with the "somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." 1 FCC 2d at 393 n.1. See also *Seven (7) League Productions, Inc. (WIII)*, 1 FCC 2d 1597, 1598-99 (1965).

⁶⁶60 FCC 2d at 418-21; 78 FCC 2d at 533-35.

⁶⁷62 FCC 2d at 955-56.

service "exceptional when compared to other broadcast stations in its service area or elsewhere."⁴⁸

41. Primary in the Commission's evaluation was WESH's local community orientation. The Commission cited several locally produced programs. These were: "Topic", a 30 minute weekly program featuring community leaders interviewed by a panel of news personnel (141x);⁴⁹ "On Camera 2", a 3—5 minute segment of the 5:30 news featuring a currently newsworthy person (47x); "Focus 2", a 15 minute Monday through Friday program with guest interviews (444x); "Opinion," a 3—5 minute segment of the weekend newscasts featuring opinions by newsmakers, community leaders, and average citizens (455x); "2 day, 2 night, and 2-morrow," a 5 minute segment of the afternoon news, in which guests discussed a variety of topics (148x); "Minute Memos," 60 second segments for civic leaders (984x); "TV Classroom," produced by Daytona Beach Community College (258x); "Opportunity Line" produced with the National Alliance of Businessmen, to provide job opportunities to the underprivileged (17x); "Local Specials," 30 minute programs of local or regional interest (84x); and news programs, elaborate weather reports, editorials, and public service announcements.

42. The Commission highlighted several aspects of WESH's programming particularly responsive to community needs. These were the "Topic" show, programming on behalf of Bethune-Cookman College and the United Negro College Fund, and a scholarship program. Furthermore, the formats of many WESH programs provided forums for local community leaders and the discussion of community problems.

43. Quantitatively, WESH's programming included 11.36% news (34% of which was local or regional), 4.47% public affairs, and 12.75% local programming. By contrast, the local CBS affiliate produced 8.05% news, 3.19% public

⁴⁸*Id.* See *Citizens Communications Center v. FCC*, 463 F.2d 822, 823 (D.C. Cir. 1972).

⁴⁹The number in parentheses is the number of times the program was broadcast during the license period.

affairs, and 7.72% local programming. Network averages for the top 25 markets were: CBS, 11.47% news plus public affairs, 13.8% local; NBC, 13.05%, 14.99%; ABC, 8.52%, 14.28%. Of the 16 hrs. and 37 minutes produced locally, 3 hrs. and 4 minutes was produced during prime time.

44. We were also impressed by WESH-TV's reputation in the community. Seven community leaders and three public officials testified that WESH-TV had made outstanding contributions to the local community. Moreover, the record shows no complaints against WESH-TV.

45. The court did not fault the Commission's characterization of Cowles' past record. The court stated that the finding that Cowles' record was not "exceptional" was amply supported by the record. Nor did the court have reason to question whether Cowles' record met the test for "superior" service set out in *Citizens Communications Center v. FCC*⁷⁰ because the Commission did not make such a finding. Rather, the court devoted the body of its comments on Cowles' broadcast record to the weight deserved, if any, in the overall comparative analysis.⁷¹ On remand, the court invited the Commission both to reconsider the characterization of Cowles' past record, if appropriate, and to articulate clearly the manner in which the past record should be taken into account in the overall comparative analysis.

46. We believe Cowles' past broadcast record should continue to be regarded as "substantial." Cowles' record is more than "minimal" but less than "superior" or "exceptional." We do not believe the Court of Appeals mandated a recharacterization. Moreover, we do not believe the parties have advanced compelling reasons to justify a recharacterization. As for Cowles' asserted reinvestment of profits and auxiliary studio, the Commission has already concluded that these represented

⁷⁰*Supra* note 68.

⁷¹598 F.2d at 56-58.

attempts to become competitive with the existing Orlando stations.⁷² As such, they are completely consistent with an intent to provide substantial service to the community. But they do not indicate more than that.⁷³ Similarly, we do not believe that the superiority of Cowles' auxiliary studio deserves merit in light of its relation to the main studio move issue.⁷⁴ We will defer our discussion of the significance of a substantial past record to our discussion of the overall comparison between Cowles and Central.

Diversification⁷⁵

47. The Commission originally concluded that Central had no outside media interests, but that a number of outside media interests were attributable to Cowles.

48. Cowles' parent, CCI, is the licensee of KRNT-AM/FM/TV, Des Moines,⁷⁶ while a wholly owned subsidiary, Cowles Tennessee Radio Properties, Inc., is the licensee of WREC-AM/FM, Memphis. CCI also published two magazines: "ASTA Travel News," the official publication of the American Society of Travel Agents, and "On Arrival," an in-flight airline magazine.

49. Additionally, CCI owns 24.6% of the class A common stock of the New York Times Company (NYT). Gardner Cowles is one of NYT's nine directors. NYT subsidiaries are licensees of WREC-TV, Memphis and WQXR-AM/FM, New York City. NYT publishes the New York Times and six daily and four weekly newspapers in Florida, including "the Ocala Star Banner" and "The Leesburg Daily Commercial," both within the Daytona Beach-Orlando ADI. Other publications of NYT are "Family Circle" and various sports and professional magazines, all of national circulation.

⁷²60 FCC 2d at 409.

⁷³Compare *Citizens Communications Center v. FCC*, *supra* note 68.

⁷⁴60 FCC 2d at 416-17.

⁷⁵78 FCC 2d at 532-33. Recent changes in the various media holding are noted *infra* at paras. 80 *et seq.* These changes are not of decisional significance.

⁷⁶KRNT-TV is now KCCI-TV and licensed to Cowles.

50. The Des Moines Register and Tribune Company (R&T) owns approximately 9% of CCI. R&T publishes the Des Moines *Register* and the Des Moines *Tribune* and owns approximately 11% of the Minnesota Star and Tribune Company (MST). MST is in turn the 47% owner of the licensee of stations WCCO-AM/FM/TV, Minneapolis, Minnesota and the operator of KTVH-TV, Hutchinson, Kansas. MST publishes newspapers in Great Falls, Montana, Rapid City, South Dakota, Denver, Colorado, and Baltimore, Maryland.

51. In view of these findings, we concluded that Central enjoyed a clear advantage over Cowles. Nevertheless, several factors persuaded us that this advantage was entitled to only slight weight. The outside media interests were for the most part remote from Florida and the Commission was reluctant to use the diversification criterion to restructure the broadcast industry, especially where there was no immediate undue concentration of control. The autonomous operation of WESH-TV provided another basis for reducing the demerit to Cowles. Ultimately, the Commission concluded that Central's diversification preference was entitled to little decisional significance.

52. The Court of Appeals faulted aspects of the Commission's analysis. The court held that outside media interests had relevance in a comparative renewal evaluation irrespective of the lack of undue concentration of control in the local market. The court also declined to accept local autonomy as a substitute for diversification. The court remanded for consideration of these factors. However, the court also observed that the Supreme Court in *FCC v. National Citizen's Committee for Broadcasting*,⁷⁷ had apparently accepted the relevance of industry stability in the comparative renewal evaluation. The Court of Appeals

⁷⁷436 U.S. 775 (1978) (hereinafter *NCCB*).

emphasized that it did not intend to specify the weight to be given the diversification factor in a comparative renewal proceeding.⁷⁸

53. We find that Central deserves a preference over Cowles under the diversification issue. As the Court of Appeals has indicated, the fact that media interests attributable to Cowles are, for the most part, outside the service area of WESH-TV and not under the direct control of Cowles, does not make them irrelevant. Moreover, Cowles' management autonomy does not substitute for diversification. We are thus left with a clear preference in favor of Central. The significance of Central's diversification advantage is best left to a discussion of the overall comparative evaluation of Central and Cowles.

Integration

54. The Commission considered Central's integration proposal very weak, entitling Central to no preference over Cowles.⁷⁹ In so holding, we noted that while Cowles proposed no integration of ownership with management, Cowles did grant the staff of WESH-TV functional autonomy. Central proposes little full-time integration. Raymond A. Chambers (3.5%) would serve full-time as supervisor of administration, a position unrelated to programming. Thomas W. Staed (3.5%) and Jeanne M. Goddard (3.5%) would serve as full-time General Manager and Program director, respectively, but only during the stations' formative period. Other stockholders (50.8%) propose part-time participation in various capacities, amounting to 5—50% of their time (weighted average 7.5%).⁸⁰ Additionally, several stockholders and the minority status of George P. Schanck (3.5%, part-time

⁷⁸598 F.2d at 53 n. 77.

⁷⁹78 FCC 2d at 536-37.

⁸⁰This part-time integration deserves little weight. *Midwest Broadcasting Co.*, 70 FCC 2d 1489 (Rev. Bd. 1979), *rev. denied*, FCC 79-397, released June 22, 1979.

public affairs adviser)⁸¹ and George W. Engram (1.7%, part-time black affairs adviser). Each has a record of local civic activities.

55. The Court of Appeals objected to two aspects of the Commission's treatment of the integration criterion. First, the court believed the Commission had not explained why the slight preference to which Central was entitled under this criterion did not receive greater weight. Second, the court criticized the Commission's reliance on management autonomy in according merit to Cowles.

56. We find that Central is entitled to a slight advantage over Cowles under the integration issue. We consider Central's advantage slight because Central proposed virtually no full-time integration and we consider the amount of full-time integration to be the most important consideration in evaluating an applicant's integration proposal.⁸² The weight Central's integration advantage ultimately deserves will be left for the discussion of the overall comparison between the applicants.

Overall comparative evaluation

57. *Court's Directive.* In making an overall comparative evaluation of Cowles and Central, the Commission originally considered diversification, integration, Cowles' main studio rule violation, and Cowles' past broadcast record. The Commission weighed these factors as follows:

We come now to the final comparative evaluation of the applicants. Central has in its favor a clear preference under the diversification criterion. Under the best practicable service criterion, while Central is entitled to a merit for the Black ownership it proposes, we have concluded in view of the overall weakness of Central's integration proposals that neither applicant

⁸¹By an amendment filed November 14, 1980, Central reported that Schanck had died.

⁸²1965 Policy Statement, 1 FCC 2d at 395-96.

is entitled to any preference for its integration proposals On the other hand, Cowles is entitled to a distinct preference under the best practicable service criterion in view of its past superior⁴³ performance. The "only blot" on Cowles' record (to use the Judge's words) is the studio move, which justifies a comparative demerit against Cowles. But since the studio move did not result in any downgrading of service to Daytona Beach . . . this demerit does not diminish Cowles' distinct preference for the best practicable service. In view of the legitimate renewal expectancies of an incumbent, especially where the licensee's past performance has been superior, and further in view of our judgment that the license renewal process should not be used to restructure the industry, we conclude that Cowles' distinct preference to render the best practicable service to the public outweighs Central's clear preference under the diversification criterion.⁴⁴

58. The Court of Appeals strongly criticized the Commission's rationale in making its comparative analysis. Some aspects of the court's criticism have already been alluded to—the factors which the Commission had held tended to minimize Central's advantages with regard to diversification, integration, and the main studio rule violation.

59. The court's preeminent concern was that the Commission had not articulated the reason why Cowles' substantial past broadcast record gave rise to a "renewal expectancy" sufficient to overcome Central's advantages. The court noted that such an expectancy was inconsistent with the treatment of past broadcast record in the Commission's *1965 Policy Statement*. First, under the *1965 Policy Statement*, only superior and not merely substantial past service had relevance. Second, even a superior record was only one factor to

⁴³*I.e.*, "substantial."

⁴⁴60 FCC 2d at 422. Citations omitted, footnotes added.

be weighed in determining which applicant was likely to provide better service in the future.⁸⁵

60. However, the court later suggested in a Supplemental Order that a meritorious past broadcast record might entitle an incumbent to a preference on an entirely different—and essentially noncomparative—rationale. The court stated:

We understand the Commission's present idea of renewal expectancies may be more expansive—that an "expectancy" may be generated by something less than or different from more meritorious service. An incumbent is said entitled to expect renewal if it has "served the public interest in . . . a substantial manner." Apparently, a "substantial" past record would be a factor weighed in the incumbent's favor irrespective of which applicant were predicted to perform better in the future. Such an entitlement would be provided to promote security directly and to induce investment which otherwise may not be made. Whether and in what manner placing such a thumb on the balance in an otherwise comparative inquiry may be reasonable are, we think, open and difficult questions.⁸⁶

After citing a number of cases, including NCCB, which applied the concept of "renewal expectancy," the court continued: "[A]lthough not a precise concept, renewal expectancies derived from 'meritorious service' . . . are a natural aspect of the public interest inquiry carried on under Section 309(e). Moreover, 'the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance.'⁸⁷ In an accompanying Supplemental Order, the court addressed the Commission's argument made in its Petition for Rehearing En Banc that, contrary to the original panel's view, a meritorious past record deserves "appropriate weight" irrespective of the predictive value of past performance. The court termed the Commission's argument "at least a plausible construction of the 'public

⁸⁵598 F.2d at 54-57.

⁸⁶*Id.* at 43.

⁸⁷*Id.* at 44. Citations omitted.

interest'.⁸⁸ The court complained, however, that "*there were few intimations that this was the Commission's inchoate rationale,*" and admonished the Commission: '*The place for a new rationale in this case, if one is to be logically developed, is on remand.*'⁸⁹ After charging the Commission to explain the weight accorded past record with sufficient clarity to permit judicial review, the court closed by saying:

We doubt that any realistic appraisal of the remand in this single case, calling upon the Commission to perform its duty in accord with its own expressed standards, could reasonably create the nervous apprehension among licensees claimed by the Commission. The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good.⁹⁰

61. *Renewal Expectancy.* Following the court's suggestion, we now undertake to explain why Cowles' substantial past record warrants a preference sufficient to overcome Central's advantages under the diversification and integration criteria and Cowles' disadvantage under the main studio move issue. At the outset we acknowledge that a substantial past record deserves no preference under the best practicable service criterion set forth in the *1965 Policy Statement*.⁹¹ Rather, our analysis concerns the somewhat different problems raised in the comparative renewal context, with which the *1965 Policy Statement* does not attempt to deal.⁹² Crucial to our analysis is the fact that failure to give a renewal expectancy to incumbents rendering meritorious service to the community would result in significant public interest detriments. We use the term "renewal expectancy" here in a generic sense. In our view, the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the

⁸⁸*Id.* at 60.

⁸⁹*Id.* Emphasis in the original.

⁹⁰*Id.* at 61-62.

⁹¹ FCC 2d at 398. Only unusually good or unusually poor records have relevance.

⁹²*Id.* at 393 n.1.

"expectancy" takes the form of a comparative preference weighed against other factors as described below at paras. 66 *et seq.* An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference. Moreover, we believe that Congress, in amending the Communications Act in 1952, ratified the Commission's judgment that these factors should be taken into account in comparative renewal proceedings.

62. The justification for a renewal expectancy is threefold. (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one. (2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded. (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry especially considering the large number of group owners.⁹³ We cannot readily conclude that such a restructuring could serve the public interest.

63. As the court acknowledged,⁹⁴ the Commission has consistently followed this rationale, although not always articulating it. Furthermore, we believe Congress has observed our practice and approved it.

64. In 1951, the Commission, in *Hearst Radio, Inc. (WBAL)*,⁹⁵ gave great weight to the desirability of continuing existing acceptable service in a comparative

⁹³More than two-thirds of commercial television stations are controlled by group owners. See *Broadcasting Cable Yearbook* (1981) at A-2, A-36-51.

⁹⁴598 F.2d at 42.

⁹⁵15 FCC 1149 (1951).

renewal proceeding. The Commission felt justified in giving the incumbent such a preference despite the following language of former §307(d) of the Communications Act: "... action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."⁹⁶ The Commission stated:

Where a finding is justified that the service being rendered is in the public interest, consideration should be given to the desirability of continuing such a proven acceptable service, which in the case of the operating applicant, is indicative of an ability to maintain or improve the acceptable service, and to the risks attendant upon terminating such service and making the facilities available to another applicant without a proven record of past performance and who may not be able to render in actual practice, a service as desirable as the one terminated.⁹⁷

Of the traditional comparative criteria such as integration and diversification, the Commission said: "[T]he value to be given each of such criteria will be determined in conjunction with [the incumbent's] record of performance."⁹⁸ The Commission proceeded to discount the challenger's integration advantage concluding:

While on the basis of both being unproved applicants, we might have given preference to [the challenger] on the point of ownership-management integration, the past record of [the incumbent's] management concerning the effectuation of ownership policy offsets the advantage . . .⁹⁹

⁹⁶See also *Wabash Valley Broadcasting Corp.*, 35 FCC 677 (1963).

⁹⁷15 FCC at 1176.

⁹⁸*Id.*

⁹⁹*Id.* at 1179-80.

As to diversification the Commission again discounted the incumbent's advantage over the challenger and held:

We believe that normally diversification is not a controlling element where a person has been licensed by the Commission for more than one station and operates these stations in the public interest; where the licenses held are not in violation of our [multiple ownership] rules; and where the record does not clearly establish from facts pertinent to the individual case, that the control of other radio facilities would make a renewal of the license not in the public interest.¹⁰⁰

The Commission had termed the incumbent's program performance as "meritorious" stating:

[The incumbent] has made a practical demonstration of its ability to render a well-rounded program presentation covering substantially the major needs of its service area, and its ability and *bona fide* intention to continue to improve upon such desirable service . . .

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65. The next year Congress amended the Communications Act to delete the questioned language, the legislative history making specific reference to Commission practice and, in our view, to WBAL.¹⁰² The Supreme Court in *NCCB* considered this a significant indication of Congressional intent. The Court stated:

[I]n amending §307(d) of the Act in 1952, Congress appears to have lent its approval to the Commission's

¹⁰⁰*Id.* at 1181.

¹⁰¹*Id.* at 1178. Emphasis added. As this language indicates, we have always viewed substantial service as a form of meritorious service. We believe the Supreme Court had this in mind when it recognized the Commission's past practice in comparative renewal cases. *Infra* note 106.

¹⁰²Communications Act Amendments, 1952 §5, 66 Stat. 614 (1952). See also S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951), H.R. Rep. No. 1750, 82d Cong., 1st Sess. 8 (1952). Compare Communications Act of 1945 §307(d), 48 Stat. 1084 (1934).

policy of evaluating existing licensees on a somewhat different basis from new applicants³¹

³¹Prior to 1952, §302(d) provided that decisions on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." . . . In 1952 the section was amended to provide simply that renewal may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby. The House Report explained that the previous "language is neither realistic nor does it reflect the way in which the Commission actually has handled renewal cases," . . . and the Senate Report specifically stated that the Commission has the "right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience, and necessity."¹⁰³

66. *Relative Weighting of Comparative Factors.* With this in mind, we turn to the questions: how should the preference arising from a substantial past record be weighed against the traditional comparative factors and, in particular, how does it apply in this case?

67. We believe that structural factors such as integration and diversification—of primary importance in a new license proceeding—should have lesser weight compared with the preference arising from substantial past service.

68. As to diversification, we believe the Supreme Court has already approved our policy in *NCCB*. In *NCCB*, the Court upheld provisions of the newspaper cross ownership rules (Sections 73.35, 73.240 and 73.636 of the Rules) which require divestiture of existing newspaper-broadcast combinations only in 16 "egregious cases."¹⁰⁴ In considering

¹⁰³436 U.S. at 810-11. Citations omitted.

this issue, the Supreme Court touched on the comparative renewal question in two connections. With respect to the question of whether the Commission was justified in not requiring divestiture of other newspaper-broadcast combinations, the Court drew an analogy between the divestiture question and the comparative renewal question. The Court noted that the rationale for not requiring divestiture was similar to that of according a "renewal expectancy" to an incumbent in a comparative renewal proceeding—the desirability of continuing meritorious service even where there would be gains in diversification by denying renewal.¹⁰⁵ The Court's approval of the Commission's decision not to require wider-ranging divestiture implies approval of the Commission's policy of giving diversification secondary importance in the comparative renewal context as well.¹⁰⁶ More specifically,

¹⁰⁴*Multiple Ownership*, 50 FCC 2d 1046 (1975).

¹⁰⁵The Court notes each of the factors previously cited: (1) the desirability of preventing losses to the broadcasters of quality programming and the possibility of discouraging investment in quality programming (436 U.S. at 805, 807); (2) the lack of a guarantee that replacing an incumbent will result in better service (*Id.* at 807); and (3) the expectation that comparative renewal proceedings will not lead to an overall restructuring of existing ownership patterns. (*Id.* at 809).

¹⁰⁶The Court stated:

In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proved broadcast service to the public, and its indirect consequence of rewarding — and avoiding losses to — licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and should not be destroyed absent good cause. Accordingly, while diversification of ownership is a relevant factor in the

the Court commented on the Commission's propose treatment of the grandfathered newspaper-broadcast combinations if they should be challenged at renewal time.¹⁰⁷ The Court observed that the Commission did not anticipate that the comparative renewal process would lead to an overall restructuring of the industry, inferred that the Commission intended to treat diversification as "a relevant but somewhat secondary factor,"¹⁰⁸ and did not indicate any disapproval.

69. We believe that the treatment of integration in a comparative renewal proceeding should be governed by analogous considerations. Integration, like diversification, is a structural factor and, therefore, has the same disadvantage if given heavy weight in the comparative renewal context. Challengers could easily structure their proposals to be superior to the incumbent's in the many instances where incumbents are group owners. The result could be a substantial restructuring of the industry with possible disruptions of service. Moreover, an incumbent

context of license renewal as well as initial licensing, the Commission has long considered the past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the "proved product" and grant renewal if the incumbent has rendered meritorious service. [436 U.S. at 805; citations and footnotes omitted].

¹⁰⁷436 U.S. at 809; *Multiple Ownership*, *supra*, 50 FCC 2d at 1087-88.

¹⁰⁸436 U.S. at 809. While the decision makes specific reference only to newspaper-broadcast across ownership situations, the principle seems even more applicable in cases, such as the present one, where the co-owned interests are diffuse and, consequently, the disadvantages of concentrated ownership less severe. *Cf. Top Fifty Ownership Policy*, 75 FCC 2d 585 (1979). *Compare Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (D.C. Cir. 1974); *Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970).

might lose the incentive to provide quality programming, because the challenger's integration advantage would be prohibitive.

70. In one important respect integration differs from diversification. While diversification satisfies the independent goal of diffusing the control of viewpoints in the mass media, integration simply serves to predict future service in the community.¹⁰⁰ The integrated owner is presumed to have a stronger tie between legal responsibility and day-to-day management and to be more sensitive to community needs than the absentee owner. This distinction between integration and diversification makes integration even less persuasive a reason to oust a meritorious incumbent than does diversification. A meritorious incumbent has established itself as being sensitive and responsible to the needs of the community. Furthermore, the meritorious incumbent is likely to have developed community ties. To presume that the service of an integrated challenger is likely to be more meritorious solely on the basis of integration—particularly in a case such as this one where the challenger's integration proposal is weak—is highly speculative.

71. Thus, the Commission considers it most reasonable to give Central's diversification and integration advantages lesser weight as compared to Cowles' preference based on substantial service. If these were the only factors involved in the comparison, Cowles, in our view, would be an easy winner. However, we must also consider Cowles' main studio rule violation. This presents the difficult task of determining whether Cowles' demerit for its violation is of sufficient gravity to alter the comparative balance we are otherwise prepared to make.

72. In contrast to structural factors such as diversification and integration, licensee misconduct may provide a more meaningful basis for preferring an untested challenger over a proven incumbent. Licensee misconduct

¹⁰⁰ 1965 Policy Statement, 1 FCC 2d at 394-95.

pertinent to broadcast service may raise questions both as the licensee's continued compliance with Commission rules and its dedication to serving the community. Such considerations tend to rebut the inference derived from a record of substantial service that the licensee will continue to serve the public in a meritorious manner. A violation of the main studio rule potentially involves both types of considerations. Thus, Cowles' violation, depending upon its nature, might be sufficient to tip the overall comparative balance in Central's favor.

73. Having carefully examined the precise nature of Cowles' violation in comparison with the clear detriment involved in depriving the public of the proven incumbent, we have concluded that the violation is not of such significance as to shift the overall comparative balance in Central's favor. Cowles' violation did not involve removing a studio from Daytona Beach and relocating it in Orlando. Rather, it involved maintaining two studios and overemphasizing the importance of the Orlando studio. Consequently, the violation does not clearly reflect on Cowles' continued willingness to abide by Commission rules or its continued dedication to Daytona Beach. Thus, the risk to the public interest posed by the violation seems small when compared to the actuality of depriving Daytona Beach of Cowles' tested and acceptable performance.

74. To summarize, we have attempted to balance the comparative factors in a manner that realistically responds to the court's concerns and that best conduces to the public interest. We have tried to confront the difficult public interest questions inherent in a comparative renewal determination and to articulate and justify the rationale implicit in our past practice. We have concluded that only by giving a substantially performing incumbent, such as Cowles, a strong preference, can the public be protected from the risks of arbitrarily destroying a proven and acceptable service. We have also concluded that, in light of these risks, structural factors such as integration and

diversification have relatively less weight in the comparative renewal context. Again, as stressed before, because the incumbent here has committed broadcast related misconduct, we recognize that this is a close and difficult case. Nevertheless, after carefully evaluating the nature and magnitude of the violation, we have concluded that the public interest balance still tips in Cowles' favor even when Central's diversification and integration advantages are taken into account.

C. Post-remand motions¹¹⁰

75. *Petition to Intervene by NAACP, NBMC, Charles Cherry, and Rosie Laster.* The Florida State Conference of Branches of the National Association for the Advancement of Colored People, Charles Cherry, its President, the National Black Media Coalition, and Rosie Laster, a member of NBMC (hereinafter NAACP-NBMC or petitioners), petition to intervene in these proceedings.¹¹¹ Petitioners are allegedly viewers of WESH-TV and claim that they have long advocated diversity of ownership and minority representation in broadcasting and have participated in many Commission proceedings. They state that their interest in these proceedings stems from a desire that a valid comparative hearing be held to ensure the best possible television service to all of the people, and that the comparative hearing be conducted consistently with the requirements of the Communications Act.¹¹² Petitioners propose to serve as neutral representatives of the public

¹¹⁰The parties have also filed several petitions for leave to amend. We will grant these petitions for reporting purposes.

¹¹¹The Commission previously denied a similar motion by the National Black Media Coalition, National Citizens Committee for Broadcasting and Citizens Communications Center. 40 RR 2d 1627 (1977).

¹¹²According to petitioners, the attempts by the parties to settle this case, with the Commission's apparent concurrence, after announcement of the Court of Appeals' Decision, establishes that the parties are no longer true adversaries and that neither they nor the Commission can be relied on to carry out the court's mandate.

interest and, thus, do not favor either Cowles or Central. In this role, petitioners have filed Reply Comments on the disposition of this case after remand, and Comments on Central's Motion for Compliance with Court Mandate. Petitioners say that they do not intend to seek designation of any issues or to introduce evidence. They intend only to aid the Commission in carrying out its statutory obligations and protect the paramount interests of the viewers of Daytona Beach.

76. In our view, petitioners have not shown a basis for intervention under the Commission's rules. Section 1.223 of the Rules requires that where a petition to intervene is filed more than 30 days after publication of the hearing issues in the Federal Register, as is the case here, petitioners must show: (1) their interest in the proceedings, (2) how their participation will assist the Commission in determining the issues in question, and (3) why the petition could not have been filed earlier. In sum, intervention will be granted only on a showing of good cause. Here, however, petitioners do not serve the purposes of the complaining witnesses granted intervention in *Office of Communications of United Church of Christ v. FCC*.¹¹³ Nor do they represent a defined group of people with an interest in the proceedings that might otherwise be slighted.¹¹⁴ Short of this, petitioners' usefulness in these proceedings is questionable since they take no firm position and offer no special knowledge or evidence.¹¹⁵ We do not see the value of having a neutral

¹¹³359 F.2d 994 (D.C. Cir. 1966).

¹¹⁴See, e.g., *Chronicle Publishing Co.*, 2 RR 2d 275 (Rev. Bd. 1964).

¹¹⁵We also question whether, in view of petitioners self-proclaimed neutrality, petitioners have a true "interest" in this proceeding notwithstanding their status as viewers. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 737-40 (1972); *Martin-Trigona v. FCC*, 432 F.2d 682 (D.C. Cir. 1970). Moreover, we doubt that failure to anticipate the outcome of a proceeding represents good cause for untimely intervention. See *Valley Telecasting Co. v. FCC*, 336 F.2d 914 (D.C. Cir. 1964); *The Trustees of the University of Pennsylvania*, 69 FCC 2d 1394 (1978), *recon. denied*, 71 FCC 2d 416 (1979).

participant where the existing parties can be relied on to develop the issues vigorously. Both the private parties and the Broadcast Bureau appear competent to explore adequately all public interest considerations.¹¹⁶

77. Nevertheless, given the significance of the central issue in this proceeding, some participation by a public interest group might be desirable. We will accept petitioner's comments as *amicus* briefs and consider them.¹¹⁷

78. *Central's motions to enlarge issues against Cowles.*¹¹⁸ Central seeks to add Section 1.65, character, misrepresentation, and an abuse of process issues against Cowles.

79. Central asserts that Cowles failed to file amendments reflecting several substantial changes in pertinent media holdings in conformity with Section 1.65 of the Rules. These changes involve the holdings of the New York Times Company (NYT) the Des Moines Register and Tribune Company (R&T), and the Minneapolis Star and Tribune Company (MST). The relationship between the listed corporations and Cowles is as follows.¹¹⁹ Cowles is a wholly owned subsidiary of CCI. CCI in turn owns 24.6% of the class A common stock of NYT. R&T at the time of hearing owned approximately 9% of the stock of CCI. R&T also owns approximately 11% of the stock of MST.

¹¹⁶*Compare WFTL Broadcasting Co. v. FCC*, 376 F.2d 782 (D.C. Cir. 1967).

¹¹⁷*See, e.g., ABC-ITT Merger*, 7 FCC 2d 347 (1967).

¹¹⁸Cowles has moved to add a Section 1.65 issue against Central and to dismiss Central's application as incomplete. Our disposition of this case moots these pleadings. Additionally, we will strike Cowles' Request for Declaratory Ruling, which seeks an interpretation of the Commission's main studio rule and all responsive pleadings, as irrelevant to this proceeding.

¹¹⁹*See Cowles Florida Broadcasting, supra*, 78 FCC 2d at 532-33. For a list of the media holdings already in evidence. *See paras. 48 et seq. supra*.

80. Several changes occurred in the holdings of NYT. These are the assignment of a television broadcast station to a wholly owned subsidiary of NYT, the acquisition of 82 cable systems and franchises in Southern New Jersey, and the acquisition at various times by NYT of six local newspapers, a magazine distributed nationwide, and HFM Publishing/Socratic Publishing Corporation.

81. With respect to R&T and MST, Central alleges that nine broadcast licenses, including one AM/FM combination, were transferred to three wholly owned subsidiaries of R&T,¹²⁰ and that MST was involved in two transfers involving broadcast interests.¹²¹

82. Central further asserts that an additional unreported transaction involving R&T reveals that a Cowles principal, Gardner Cowles, Jr.,¹²² committed fraud and misrepresented his relationship to R&T to the Commission. Central alleges that on June 21, 1978, R&T

¹²⁰These are: the March 8, 1979 assignment of KHON-TV, Honolulu, Hawaii, KAIL-TV, Wailuku, Hawaii, KLAK-FM, Lakewood, Colorado, KPPL-FM, Lakewood, Colorado, KYXI-AM, Oregon City, Oregon, and KGON-FM, Portland, Oregon, to Western Sun, Inc.; the July 13, 1977 transfer of WQAD-TV to Quad-Cities Communications; and the September 1, 1978 transfer of WIBA-AM/FM, Madison, Wisconsin to Badger Communications, Inc.

¹²¹On December 13, 1977, WDRB-TV, Louisville, Kentucky, was transferred to MST. On May 12, 1976, ownership of Midwest Radio TV, Inc., licensee of WCCO-TV/AM/FM changed from 53% Mid-Continent Radio, Inc., 47% MST, to 53% MTC Properties, Inc. and 47% MST. Additionally, Central alleges that the transfer was prompted by a petition to deny filed by the Justice Department on undue concentration of control grounds.

¹²²Gardner Cowles founded the predecessor of CCI, Cowles parent corporation, in 1936 to publish *Look* magazine. He has served as President and Chairman of the Board of CCI and has served as a Director of R&T. Cowles Exh. Z-3 BB Exh. 51A. He is CCI's largest individual stockholder. Cowles Exh. 128A. He currently serves as honorary Chairman of the Board of CCI, and in that capacity votes Cowles stock. See Ownership Report submitted by Cowles January 16, 1980. Gardner Cowles formally severed his relationship with R&T in 1973. See para. 84 *infra*.

fraudulently sold to Gardner Cowles 320,000 shares of CCI stock at a price which was \$2 a share less than the value of the R&T stock traded on the New York Exchange the same day. Moreover, Central asserts, Gardner Cowles was required to pay only 6% interest on the unpaid balance of the purchase price although the current prime rate was 8.75%, and R&T itself was required to borrow \$30 million at 9.625% interest to purchase McCoy Broadcasting Company in a related transaction. The purchase of McCoy Broadcasting Company and related transactions formed the basis for causes of action in a stockholders derivative suit against R&T.¹²³

83. Central contends that the facts alleged in the stockholders' derivative suit raise a substantial question as to whether Gardner Cowles was involved in a scheme to defraud the minority stockholders of R&T. Central submits that involvement in such a scheme would tend to raise further questions concerning Cowles' character, already tainted by the mail fraud issue. As Gardner Cowles is the honorary Chairman of the Board of Cowles, Central submits a connection with Cowles has been established. In view of this allegedly substantial question raised, Central asserts Cowles was obligated to report the existence of the suit under Section 1.65 of the Rules.

84. Central also alleges that the stockholders' suit raises substantial questions concerning the accuracy of representations made by Cowles to the Commission about a voting trust, established April 11, 1973, by Gardner Cowles

¹²³ *Watts v. Des Moines Register and Tribune Company*, Civil No. 78-400-1 (S.D. Iowa, filed January 17, 1979). That suit alleged a conspiracy by members of the Cowles family to oppress minority stockholders of R&T in violation, *inter alia*, of §10(b) of the Securities and Exchange Act, 15 U.S.C. §78(b) (1976); 17 C.F.R. §240.10b-5 (1980). In addition to an allegation that the sale of CCI stock was not in the best interest of the stockholders, the complaint alleges that the directors of R&T (at least some of whom are members of the Cowles family) effectively made a gift of \$1 million to Gardner Cowles by giving him credit on unduly favorable terms.

for the deposit of all R&T stock held by him. Observing that two trustees are defendants in the stockholders' derivative suit, accused of giving unfair advantages to Gardner Cowles, Central maintains that Cowles' representation that the trustees were "entirely independent of Gardner Cowles" is a misrepresentation.¹²⁴ More generally, Central doubts the truthfulness of Cowles' representation that R&T was independent of Gardner Cowles.¹²⁵

85. Central also charges that the judgment in a recent lawsuit in which Cowles' parent, CCI was held liable for defamation, reflects adversely on Cowles' qualifications. Central does not, however discuss the facts of that case beyond the assertion that CCI was found to have had actual malice.¹²⁶ Central also call the Commission's attention to information contained in several ownership reports filed between 1969 and 1972 without explaining either the significance or timeliness of this information.

86. Finally Central urges that Cowles has abused the Commission's processes. As previously mentioned, on June 1, 1979, the parties submitted to the Court of Appeals a stipulation for dismissal, including a settlement agreement. At the same time, the Commission moved for modification of the court's judgment to restrict consideration on remand to Cowles' basic qualifications. Central charges that by opposing the Motion to Modify Judgment, Cowles undermined the parties' good faith attempt to settle the case while complying with the court's mandate.

¹²⁴See Cowles Exh. 128B at 7; Cowles Exh. 142 at 6.

¹²⁵See Cowles Proposed Finding of Fact and Conclusion of Law, filed August 29, 1978 at 238. Cowles Reply Findings of Fact and Conclusions of Law, filed October 5, 1973 at 76.

¹²⁶*Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363 (N.D.Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 897 (1981). In that case, former San Francisco Mayor Joseph Alioto had erroneously been accused by a *Look* magazine article of having links with organized crime. The court held that the *Look* staff had been recklessly indifferent to the truthfulness of these charges because it had unjustifiably used an unreliable informant. CCI, as *Look's* publisher was held vicariously liable; there was no direct involvement by executive level personnel.

87. The Commission will not add further issues against Cowles. No purpose would be served by the injection of questions of distinctly secondary importance into this already protracted proceeding. Generally, we are concerned that adding further issues would have the effect of diverting our attention from the issues specified in the Court of Appeals mandate.¹²⁷ Moreover, we do not believe that Central has raised substantial questions.

88. There is no justification for adding a Section 1.65 issue against Cowles based on a failure to report changes in the various media holdings. Notification of most of the changes were informally served on Central, and, in any event, the facts of these transactions were all reported via the Commission's regular reporting procedures. Indeed, the broadcast acquisitions required Commission approval. Furthermore, it seems highly unlikely that any of these transactions would have decisional significance. They do not alter the comparative positions of Cowles and Central in any significant way.

89. Addition of issues based either on the stockholders' derivative suit against R&T or the defamation suit is also not warranted. With regard to the stockholders' suit, the Commission has stated that allegations of this kind do not merit Commission inquiry absent adverse findings by the forum with primary jurisdiction.¹²⁸ At the present time the suit is within the jurisdiction of the district court and no adverse action has resulted. Thus, it would be premature for the Commission to draw conclusions adverse to any party. Furthermore, the nexus between the suit and Cowles is tenuous. The most direct linkage is represented by Gardner Cowles, who, while discussed in the factual portion of the

¹²⁷The Commission has an obligation on remand to carry out the judgment of the Court on the proceedings and record appealed. See *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971); *KWAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir. 1961); Communications Act §402(h), 47 U.S.C. §402(h) (1976); 28 U.S.C. §2347(c)(1976).

¹²⁸*Sonderling Broadcasting Company*, 46 RR 2d 889 (1979).

complaint, is not a defendant. For these reasons, it is highly speculative whether the suit reflects any defect in the qualifications of the broadcast applicant.¹²⁹ As to the defamation suit, we see no basis for imputing liability based on the staff level misconduct at *Look* magazine to Cowles.

90. With regard to the abuse of process question, we have examined Cowles' pleading and conclude that it represents a legitimate and good faith position. In moving the court to modify its judgment, the Commission proposed that in consequence of the settlement agreement no comparative issues remained for consideration and, therefore, that only basic qualifications issues need have been considered on remand. Cowles merely asserted that the court had raised no questions concerning Cowles' basic qualifications and that no remand proceedings at all would be necessary. We find such an argument entirely reasonable and consistent with the parties' settlement efforts. Therefore, no abuse of process has occurred.

91. ACCORDINGLY, IT IS ORDERED, That the Petition to Intervene, filed August 6, 1979, by the Florida State Conference of Branches of the National Association for the Advancement of Colored People, Charles Cherry, the National Black Media Coalition, and Rosie Laster IS DENIED; and their Reply Comments, filed October 30, 1979, and their Comments on Central's Motion for Compliance with Court Mandate, filed December 3, 1980 ARE ACCEPTED as briefs *amicus curiae*.

92. IT IS FURTHER ORDERED, That the Motion to Exclude Cowles' Request for Declaratory Ruling from Docket Nos. 19168 et al., filed April 15, 1980, by Central Florida Enterprises, Inc., IS GRANTED, and the Request

¹²⁹Because no officer or director of Cowles or CCI is named as a defendant in the suit and because R&T reported the suit to the Commission in an Ownership Report filed February 26, 1979, we see no violation of Section 1.65 in Cowles' failure to file notice of the suit in these proceedings. Compare *Lorain Community Broadcasting Co.*, 18 FCC 2d 686 (1969).

for Declaratory Ruling, filed February 29, 1980, by Cowles Broadcasting, Inc. and all responsive pleadings ARE STRICKEN from this proceeding as irrelevant.

93. IT IS FURTHER ORDERED, That the following pleadings filed by Cowles Broadcasting, Inc. requesting that issues be added against Central Florida Enterprises, Inc. and that Central's application be dismissed ARE DISMISSED as moot: Contingent Motion to Enlarge Issues, filed December 11, 1978; Notice of Removal of Contingency and Supplement to Contingent Motion to Enlarge Issues, filed August 7, 1979; Motion to Dismiss Application, filed August 2, 1979; Petition to Enlarge Issues, filed July 15, 1980; and Petition to Enlarge Issues, filed November 25, 1980.

94. IT IS FURTHER ORDERED, That the following pleadings filed by Central Florida Enterprises, Inc. seeking enlargement of the issues against Cowles Broadcasting, Inc. ARE DENIED: Petition for Administrative Relief, filed December 26, 1979; Further Petition for Administrative Relief, filed May 15, 1980; Comments on Petition for Leave to Amend, filed September 2, 1980; and pertinent portions of Comments and Request for Immediate Decision or for Alternative Relief, filed October 5, 1979; and COMMENTS on Cowles Notice of Removal of Contingency and Supplement to Petition to Enlarge Issues, filed August 31, 1979.

95. IT IS FURTHER ORDERED, That the following petitions for leave to amend ARE GRANTED: Cowles' Broadcasting Inc.'s petitions of November 15, 1978, and July 31, 1980; and Central Florida Enterprises, Inc.'s petitions of July 24, 1980, August 1, 1980, October 1, 1980, December 15, 1980, and January 29, 1981.

96. IT IS FURTHER ORDERED, That the Motion for Compliance with Court Mandate, filed November 4, 1980, IS STRICKEN as unauthorized.

97. IT IS FURTHER ORDERED, That Cowles Broadcasting, Inc.'s application for renewal of its license to

operate WESH-TV, channel 2, Daytona Beach, Florida (BRCT-354) IS GRANTED, and the mutually exclusive application for a construction permit, filed by Central Florida Enterprises, Inc. (BPCT-4346) IS DENIED.¹³⁰

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

¹³⁰Several procedural matters remain to be disposed of, Central's Motion to Strike, filed September 21, 1979 IS GRANTED, and NAACP-NBMC's Reply to Opposition to Petition to Intervene, filed September 14, 1979 IS STRICKEN; Cowles' Petition for Leave to File Further Reply Comments, filed December 7, 1979, and Central's Petition to Accept Special pleading ARE GRANTED; Central's Motion to Strike Unauthorized Pleading, filed July 31, 1980 IS DENIED; Motions to Strike, filed February 14, 1980 and June 6, 1980 by Cowles ARE GRANTED to the extend Central's pleadings reargue the merits of the issues, and correspondingly, Central's Petition to Accept Special Pleading, filed March 10, 1980 IS GRANTED IN PART AND DENIED IN PART.

DISSENTING STATEMENT OF COMMISSIONER
JOSEPH R. FOGARTY

IN RE: COMPARATIVE RENEWAL PROCEEDING
INVOLVING APPLICATIONS OF COWLES
BROADCASTING, INC. (WESH-TV) FOR RENEWAL
OF LICENSE AND CENTRAL FLORIDA
ENTERPRISES, INC. FOR CONSTRUCTION
PERMIT FOR NEW TELEVISION BROADCAST
STATION FOR CHANNEL 2, DAYTONA BEACH,
FLORIDA—ON REMAND FROM THE COURT OF
APPEALS FOR THE D.C. CIRCUIT

"The development of Commission policy on comparative renewal hearings has now departed sufficiently from the established law, statutory and judicial precedent, that the Commission's handling of the facts of this case make embarrassingly clear that the FCC has practically erected a presumption of renewal that is inconsistent with the full hearing requirement of Section 309(e)."

-Central Florida Enterprises, Inc. v. FCC, 598 F. 2d 37, 51 (D.C. Cir. 1978), *vacating and remanding Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372 (1976) . . .

"Those who cannot remember the past are condemned to repeat it."

George Santayana

I. Introduction and Background

WESH-TV's first license renewal proceeding now enters its second decade. The Commission's original and clarifying decisions, together with subsequent judicial opinions, already extensively chronicle the factual record and legal issues presented.¹ While I have no desire to prolong the

¹*Cowles Florida Broadcasting, Inc.* 78 FCC 2d 500 (1973) (Initial Decision), 60 FCC 2d 372 (1976) (Commission Memorandum Opinion and Order), *recon. denied and clarified*, 62 FCC 2d 953 (1977), *recon. denied*, 40 RR 2d 1627 (1977), *vacated and remanded sub nom., Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *reh. en banc denied and modified*, 598 F.2d 58 (D.C. Cir. 1979), *pet. for cert. dismissed*, 441 U.S. 957 (1979).

continuing dialogue between the Commission and the reviewing court, my position as the sole dissenter requires a reasonably detailed explanation of my rationale for favoring the challenger over the incumbent. It will also be demonstrated, as a consequence, that for all its widely advertised shortcomings,² the comparative renewal process is less to blame for these unconscionably extended proceedings than the Commission's persistent refusal to meet its responsibilities under its own policies and its governing statute. As in *WPIC, Inc.*,³ the first comparative renewal case in which I participated—and in which I also felt bound to dissent—any procedural or substantive shortcomings of the comparative process cannot obscure or immunize the fundamental shortcomings of the incumbent's performance and stewardship.

At the core of every comparative renewal proceeding is the inescapable principle that the comparative hearing process, however taxing and vexing, binds this Commission with the force of law. We must therefore strive to apply that process faithfully and consistently. The "renewal expectancies" of incumbent licensees, so much relied upon in today's majority decision, are not the only expectancies involved in comparative renewal proceedings. The Commission and the public have expectancies that existing licensees will comply with our rules and policies. Most importantly, competing applicants are equally entitled to "challenge expectancies:" that the Commission will implement its existing policies and apply the law fairly and impartially to parties initiating competing applications in good faith reliance on our administration of the statutory licensing scheme. When the Commission dodges, shirks or

²See *Report of the Federal Communications Commission to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives Re the Comparative Renewal Process* (1976).

³68 FCC 2d 381 (1978), Dissenting Statement of Chairman Charles D. Ferris and Commissioners Joseph R. Fogarty and Tyrone Brown, *id.* at 415-55, Separate Statement of Commissioners Joseph R. Fogarty and Tyrone Brown, *id.* at 466-67.

ignores this fundamental responsibility, it abrogates its trust as surely as a license engaging in serious misconduct.⁴

The Commission here considers—or, more accurately, reconsiders at the judiciary's behest—the application for renewal of Cowles Broadcasting, Inc., licensee since 1966 of WESH-TV, Daytona Beach, Florida (NBC, Ch. 2). Cowles' first renewal application was designated for hearing, together with the competing application of the challenger, Central Florida Enterprises, Inc., in 1971. In the original decision granting renewal and denying the competing application,⁵ the Commission found that the incumbent licensee had moved its main studio from its community of license without Commission permission and in violation of the rules, and that its parent corporation, through various subsidiaries, had engaged in extensive mail fraud involving the sale of "paid during service" (PDS) magazine subscriptions. In contrast, the challenger offered a less concentrated media ownership structure, as well as relatively greater integration of station ownership and management, enhanced by minority citizen participation. The incumbent nevertheless prevailed after the Commission ostensibly took the obligatory "hard look" at the applicants' comparative attributes. The key to this result, according to the Commission, was its finding that Cowles' past broadcast record was of "outstanding quality," and hence "superior" within the meaning of *Citizens Communications Center v. FCC*,⁶ and thus entitled the incumbent to "a plus of major significance" and ultimately "an expectation of renewal" over the challenger's structural advantages. (The ALJ had characterized Cowles' past performance as "thoroughly acceptable" but with the same effect.) In a following "clarifying" order,⁷ the

⁴For a more extensive discussion of the statutory, policy, and judicial mandates governing Commission comparative proceeding decision-making, see *WPIX, Inc.*, Dissenting Statement, *supra* note 3, at 417-19.

⁵60 FCC 2d 372 (1976).

⁶447 F.2d 1201, 1213 and n. 35 (D.C. Cir. 1971).

⁷62 FCC 2d 953 (1977).

Commission indicated that its use of "superior" was intended to denote a level of service which was "sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal." This amended finding of "substantial" performance, although not implying "exceptional" service compared to other stations, nonetheless again moved the Commission to accord the decisive renewal expectancy to Cowles.

The Commission's original decision did not lack official detractors. Then-Chairman Wiley's initial dissent⁸ was premised ". . . not on my personal view of the equities involved—but rather upon a reluctant conviction that a grant of renewal would be inconsistent with the law as I understand it." "While my own philosophy and values do not suggest that Cowles should lose its license," he continued, "I cannot agree that it is possible to remain faithful to the Commission's announced comparative criteria and still grant Cowles a preference over its competitor." The Chairman went on to observe that under the applicable judicial decisions, the Commission was obligated to follow a policy of comparative evaluation, including the application of diversification and intergration criteria, absent a change in the statute. While Chairman Wiley initially concluded that Cowles' past record appeared insufficient to offset its disadvantage under the other comparative criteria, the majority's clarification order ultimately—and somewhat miraculously—recovered his concurring vote with its *more modest* recharacterization of Cowles' past performance as "solid" or "substantial."⁹

Then-Commissioner Robinson's dissent,¹⁰ while setting out a more extensive discussion of comparative renewal history and policy alternatives, did not depart substantially

⁸60 FCC 2d at 430-33.

⁹62 FCC 2d at 958-59.

¹⁰60 FCC 2d at 435-48.

from the Chairman's discomfitted analysis. Robinson stated: "I do not say that the result in this case could not be justified by a rational policy. I only say that it cannot be justified by the policy which the Commission purports to follow By treating an ordinary (of 'thoroughly acceptable') performance as superior, the Commission signals all licensees that their licenses are safe from challengers, at least so long as they do not egregiously misbehave. Whether or not that might be a reasonable policy to pursue, it is not the policy which the Commission purports to follow."

Addressing the majority's rationale, Robinson observed that the challenger, Central Florida, had accrued comparative merits for diversification of ownership, for integration of management, for minority ownership, and for not having violated Commission rules as had Cowles (leaving aside the parent corporation's involvement in mail fraud on the ground such misconduct did not involve the subsidiary broadcast operations). Thus, Robinson noted, "[T]he score is still 4 to 0 in Central's favor as we enter the last stage of the game—wherein we address the question of best practicable service." Noting how the majority had elevated Cowles' past performance from "thoroughly acceptable" to "superior" (only later to lower it again to "substantial"), Robinson observed that the comparative weight accorded this ultimate characterization was only indirectly specified by the subsequent implication of "administrative feel:" "The Commission's decision indicates that the weight can be expected to be greater than any number of mere 'plusses,' 'merits,' 'preferences,' or gumdrops which any challenger can earn . . . 'superior' means whatever the licensee has done, provided the licensee itself has not seriously misbehaved."

Then-Commissioner Hooks provided a third dissent,¹¹ leaving the Commission's original decision with a majority of the narrowest margin. Hooks succinctly stated: "[T]he

¹¹60 FCC 2d at 434.

fault in this case clearly lies not with our comparative standards [based on the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393], imperfect as they may be; the fault is that the majority—to reach a result—distorts the *Policy* almost beyond recognition. It seems to me illogical, then, to inveigh against a *Policy* which was all but ignored.”

On review, the Court of Appeals for the District of Columbia Circuit was seemingly more impressed by the two remaining dissents than the majority decision. It vacated and remanded the decision in a closely-reasoned opinion remarkable for its painstaking point-by-point analysis and the thoroughness and specificity of its guidance on remand. I will shortly compare the specific deficiencies identified by the court with the second majority decision. The court’s opinion, however, makes two overall observations which should be reiterated here at the outset, as they all too accurately have foreshadowed today’s result.

First, the court’s remand order perceptively noted that “The Commission plainly disfavors use of the 1965 criteria in comparative renewal proceedings,” and that “This is largely because the Commission dislikes the idea of comparative renewal proceedings altogether—or at least those that accord no presumptive weight to incumbency *per se*.”¹² The court’s response to such Commission psychic discomfiture is plain and unequivocal:

We are especially troubled by the possibility that settled principles of administrative practice may be ignored because of the Commission’s insecurity or unhappiness with the substance of the regulatory regime it is charged to enforce. Nothing would be more demoralizing or unsettling of expectations than for drifting administrative adjudications quietly to erode the statutory mandate of the Commission and judicial precedent.¹³

¹²598 F.2d 37, 50 (Footnotes omitted).

¹³*Id.* at 58.

How well the current majority has heeded this admonition should be self-evident.

The court's second observation bears directly on the central issue in today's majority decision: that is, the nature and effect of the "renewal expectancy." The Commission's petition for rehearing had advanced the traditional argument that "industry stability" requires that a "substantial" or "meritorious" past record of an incumbent be given "appropriate weight" irrespective of its predictive value and irrespective of any finding concerning the challenger's likely future performance. While the court's *per curiam* order denying the rehearing petition and amending its original decision stated that this argument was "[A]t least a plausible construcion of the 'public interest,'" it held that "*. . . there were few intimations that this was the Commission's inchoate rationale,*" and that "*The place for a new rationale in this case, if one is to be logically developed, is on remand.*"¹⁴ The court further advised the Commission—

[I]f through rule-making or adjudication the Commission decides to accord weight to such noncomparative values as industry stability, it will have to do so in a manner that is susceptible of judicial review. This would seem to require that the Commission describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria.¹⁵

Earlier, in its original opinion, the court had expressed a similar concern with respect to the paucity of analysis and reasoning in the Commission's ultimate "comparative evaluation:"

Even were we to agree (and we do not agree) with the Commission's trivialization of each of Central's

¹⁴*Id.* at 60 (Original emphasis; footnote omitted).

¹⁵*Id.* at 60-61 (Footnote omitted).

advantages, we still would be unable to sustain its action here. The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on "administrative 'feel.'" ¹⁶

While the court did not expressly endorse the analogy to mystical Eastern philosophy in Commissioner Robinson's dissent,¹⁷ it pointedly observed that the Commission's "intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary."¹⁸

I am certain that the court will soon have the opportunity to consider whether today's second majority opinion, measured against the remand's express dissatisfactions, improves the Commission's decisional process to a level which, if not "superior" and therefore comparable to a Zen master's koan, at least rises to the more modest level of "substantial" and therefore may warrant judicial approval. The following analysis indicates my expectation that the latest majority koan will only elicit another judicial groan.

The past should be only prologue. Today's majority decision is only instant replay.

II. Analysis

A. The Designated Issues

1. The Main Studio Move Violation

The court's remand order found that "The Commission was amply supported in its finding that Cowles moved its main studio from Daytona Beach to Orlando, in violation of FCC regulations."¹⁹ The Commission nonetheless

¹⁶*Id.* at 50 (Footnote omitted).

¹⁷60 FCC 2d at 442 n. 16 and text. Robinson compared the majority's "administrative 'feel'" to Zen Masters' "koans"—intellectually inscrutable utterances intended to prick the intuition—and found the latter more helpful to comprehension. The comparison is all the more disconcerting when it is recalled that while Zen practitioners' mission is to explain the totality of life, the Commission's responsibility and calling is far more modest.

¹⁸598 F.2d at 50.

¹⁹598 F.2d at 51.

originally attempted to reduce this violation to a "slight demerit," rationalizing that the move was not effected in "deliberate defiance" of FCC rules, and that Central had failed to show that service to Daytona Beach had suffered as a result of the *de facto* move. The court, however, was plainly unimpressed by this recitation of "mitigating factors." It ruled that "[T]he failure to show injury hardly excuses a plain violation,"²⁰ and that "[T]he mere absence of bad faith cannot mitigate [the violation]."²¹ The court accordingly ordered the Commission on remand to "consider what weight to accord Cowles' plain violation of an FCC rule."²²

While purporting to "agree with the court that Cowles must be assessed a demerit for its violation of the main studio rule," the majority today persists in its previous attempt to trivialize this violation. Thus, according to the majority, because "Cowles did not actually move a studio away from Daytona Beach," but instead "maintained two studios, one of which gradually became somewhat superior to the other," the comparative significance of the violation should be reduced to that of a minor peccadillo. The majority finds, again, that "while a violation of the rule technically occurred, Cowles demonstrated no tendency to flout Commission rules or disserve its community of license." Later, in its putative "overall comparative evaluation," the majority relies on this assertion to conclude that the violation "does not clearly reflect on Cowles' continued willingness to abide by Commission rules or its continued dedication to Daytona Beach."

The majority's whitewash of the main studio move violation plainly ignores the law of this case, as declared by the court of appeals, and does further violence to the factual record and to the important policy underlying the rule Cowles violated. Cowles' violation must be given a substantial comparative demerit.

²⁰*Id.* at 52.

²¹*Id.*

²²*Id.*

It is all too obvious that the majority has reverted to the same "mitigating factors" which the court emphatically dismissed. Again, the majority implies that the violation is of minimal consequence because there is no specific evidence that Cowles intended to ignore its community of license or that the main studio move had that effect. To repeat the court's ruling: "[T]he failure to show injury hardly excuses a plain violation. The regulation here involves a presumption that it is bad to have the main studio located—or slyly relocated—other than in the principal community."²³ Similarly, the argument that Cowles did not "flout" the rule (presumably because it did not send the Commission status reports of its intentions and actions before, during, and after the violation) is wholly unresponsive to the issue on remand. As the court could not have more plainly stated: "Obviously Cowles moved its principal operations little by little; and it is well-settled that people are held to intend the obvious consequences of their acts. Further, Cowles is chargeable with knowledge of the main studio regulation. Thus, we are left with an *intentional* violation of a Commission rule."²⁴ The majority would obviously prefer to focus on the hopeful absence of any open and notorious (and hence potentially disqualifying) violation, rather than on a violation that is merely intentional (but nonetheless quite disquieting in comparative analysis). The trouble with this "no flout" gloss, of course, is that it flouts the remand order of the court of appeals.

The majority's refusal to assess the gravity of Cowles' intentional violation in the context of the facts of record and the purpose and policy of the main studio rule is also egregious error. The purpose of the rule is to ensure that the licensee will devote its resources and efforts primarily to its

²³ *Id.*

²⁴ *Id.* (Emphasis added).

community of license.^{24A} The rule thus reflects and supports the critical allocation and licensing policy of Section 307(b) of the Communications Act which mandates a "fair, efficient, and equitable distribution" of broadcast service "among the several States and communities."^{24B} Violations of the main studio rule therefore strike at the very heart of the statutory scheme for the provision of broadcast service.

The facts of record clearly establish an intentional violation of this important rule and also plainly indicate that Cowles' violation was the result of a conscious decision to put commercial self-interest above its public interest responsibilities. The Commission has specifically found that WESH-TV's reputed "main" studio just outside Daytona Beach was inferior to the "auxiliary studio" at Winter Park, just outside Orlando. This conclusion is compelled by findings that Cowles treats the Winter Park facilities as its principal place of business; that according to the only record evidence on point, a significantly greater amount of programming was produced at Winter Park; that more persons were employed and hours of operation were longer at Winter Park; that a majority of the station's officers had offices at Winter Park; that 59% of the station's physical assets were allocated to Winter Park compared with only 15% to Daytona Beach; and that a former General Manager was fired for giving insufficient attention to Orlando. Most pertinent and damaging, however, is the Commission's own finding that while no single licensee decision or act could be identified as tipping the balance of resources in favor of Winter Park, it was "the commercial lure of Orlando" that *motivated* the main studio rule violation.

These record findings patently contradict the majority's indulgent conclusion that Cowles' intentional violation demonstrates "no tendency to flout Commission rules or to

^{24A} See *KTVO, INC.*, 47 FCC 2d 79 (1974); *John H. Phipps Broadcasting Stations, Inc.*, 43 FCC 2d 1188, 1188-89 (1973); *South St. Paul Broadcasting Co.*, 43 FCC 2d 600, 600-01 (1973); *KTVE, Inc.*, 22 FCC 2d 477 (1970).

^{24B} See *South St. Paul Broadcasting Co.*, 43 FCC 2d 600, 600 (1973).

disserve the community of license." These findings plainly indicate an unacceptable licensee mentality that willingly subjugates public trustee responsibilities to private commercial gain. They also evidence a clear lack of the requisite sensitivity to the primary local needs and interests of the community of license. The people of Daytona Beach, not Orlando, were entitled to Cowles' best resources and efforts. On this records, they plainly received considerably less. Thus, contrary to the majority's opinion, Cowles' main studio rule violation *does* "clearly reflect on Cowles' continued willingness to abide by Commission rules [and] its continued dedication to Daytona Beach." While this violation alone would not necessarily disqualify Cowles in a non-comparative renewal evaluation, it must count as a substantial demerit against the incumbent in its comparative competition with Central. This violation and its underlying facts, circumstances, and motivation also correlate with and reinforce the adverse conclusions which must be drawn under the mail fraud issue.

2. Mail Fraud

In reversing the Commission's earlier decision, the court of appeals expressed strong dissatisfaction with the Commission's treatment of the mail fraud issue designated against Cowles:

[I]t appears from the record that there were at least two persons who were principal officers both of Cowles and of each of the five PDS subsidiaries. Neither the ALJ nor the Commission made findings concerning these common officers. In light of this uncontradicted evidence it is plain that the Commission's finding that there was no connection between Cowles and the PDS companies apart from common ownership by CCI is unsupportable. On remand the Commission will have to reconsider its findings and, if appropriate, consider the relevance of wrong-doing by a related corporation sharing principal officers with the licensee.²⁵

²⁵*Id.* (Footnote omitted).

The majority pays as much attention to this admonition as it gives to the court's discussion of Cowles' main studio rule violation: it sidesteps the remand directive and ignores the record. After reciting the organizational positions and functions of the two officers common to both Cowles and the PDS companies, Messrs. Marvin C. Whatmore and John F. Harding, the majority finds that they were "essentially officers of CCI," the parent company, and not "operating officers" of either the broadcast or PDS subsidiaries. While the majority notes, in quick passing, that Whatmore and Harding were "generally aware" of the "existence of misconduct" in the PDS subsidiary operations, it finds "no basis to conclude that either Whatmore or Harding participated in or encouraged any misconduct." Because the majority postulates that "Functionally, the PDS subsidiaries and WESH-TV are linked only by their common relationship with CCI," and because the broadcast facilities were not used to promote mail fraud and did not share "operating personnel" with the PDS subsidiaries, it concludes—again—that "neither disqualification nor a comparative demerit is warranted."

As in the case of the main studio rule violation, the majority insists on its right to address the wrong issue. The issue which the court clearly put to the Commission on remand is not merely whether Whatmore and Harding were subsidiary "operating officers" or actively participated in day-to-day PDS subsidiary wrong-doing; the issue is the nature of the management interrelationship between CCI and its various subsidiaries and the effect of that interrelationship on the stewardship and operation of WESH-TV. *The critical factor in a proper determination of this issue is that individuals with broad responsibility for overseeing the operations of the PDS subsidiaries had that same responsibility with respect to the broadcast subsidiary.* While these individuals did not participate in the management of the various subsidiaries on a day-to-day basis, the magnitude and pervasiveness of the PDS misconduct ineluctably raises questions about higher level

management as well. The record therefore implicates a very serious question as to the manner in which CCI and its management might permit or even encourage its subsidiaries to operate in the future. This question does not involve visiting the sins of one child on another through their common parent; rather, it requires the recognition that here the parent was and still is the master of all its children.²⁶

It bears emphasizing that it is not necessary to dispute the majority's characterization of Whatmore and Harding as the chief financial and legal officers of CCI, rather than operating officers of the subsidiaries, to find that this issue must weigh heavily against Cowles. The plain implications of the PDS fraud go beyond faults in the day-to-day operation of the subsidiary, rising almost to the level of management complicity. The Commission itself has previously found—and the majority now conveniently ignores the fact—that CCI had condoned or at least been tardy in preventing fraud in the PDS subsidiaries because the fraudulent practices contributed in large measure to the financial benefit of owning the subsidiaries:

[T]he record supports the main thrust of the Judge's findings that despite CCI's window-dressing efforts to cleanse the PDSs, the real emphasis was on boosting sales rather than preventing unsavory practices; . . . [I]t is inconceivable CCI could have been unaware of those practices until the government forced its hand, unless it chose to remain unaware. The record fully demonstrates CCI's ever-escalating efforts to stamp out fraud in the PDSs, which efforts permit an inference that even though

²⁶See *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1, 47-50, 111-116 (1980) and cases discussed therein. The principle established by these Commission decisions is that non-broadcast subsidiary misconduct, which implicates common parent organization officers and management is relevant to the "character" qualifications and expectations respecting a broadcast licensee subsidiary, because the broadcast subsidiary is also the responsibility and under the ultimate control of the common parent organization and its personnel.

CCI's eyes were opened by its own investigations, it allowed (while obtaining for appearance's sake written pledges of exemplary conduct from PDS dealers) the PDS practices to continue until the civil decree took the profit out of them.²⁷

These specific findings clearly indicate upper-level CCI management responsibility for the fraudulent practices of the PDS subsidiaries. As in the case of the main studio rule violation, propriety again lost to profit. The plain implications of these findings cannot now be contained—as the majority attempts to confine them—within arbitrarily selected “functional” boxes on the CCI intercorporate organization chart.

These findings force the conclusion that an understanding of the CCI-PDS subsidiary relationship must be charged to the executive officer with ultimate responsibility for monitoring the budgets, business practices, major expenditures, and fund transfers of CCI and the PDS subsidiaries. Whatmore, one of the three-member Executive Committee of CCI, had that responsibility,²⁸ and, most significantly, Whatmore had the same role with respect to WESH-TV.²⁹ Like responsibility also inheres in Whatmore's role in acquiring subsidiaries for CCI.³⁰ Similarly, as Vice President-General Counsel of CCI, Harding had the ultimate responsibility for monitoring the legality of the subsidiaries' operation, including receiving complaints.³¹ He participated in the acquisition of subsidiaries³² and also was involved in major decisions with respect to broadcasting.³³ Most significantly, Whatmore and Harding were both assigned major roles in

²⁷60 FCC 2d at 404.

²⁸Tr. 2947-8, 3332, 3334. Gardner Cowles and Harding were the other two members.

²⁹Tr. 2942-3.

³⁰Tr. 2850, 2852, 2944, 2949, 3265, 3334.

³¹Tr. 3031-2, 3038-41, 3067, 3263-4. According to Cowles, Harding is now deceased; however, this fact does not moot the significance of his participation. *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973).

³²Tr. 2850, 2868-9, 2944.

³³Tr. 2874-75, 2877, 2881, 2883-6, 2890, 2896-7.

the late and ineffectual efforts to "clean up" the PDS fraud.³⁴

Given this clear coincidence of responsibilities for WESH-TV and the PDS subsidiaries in Whatmore and Harding, there is real and immediate reason to be concerned about other possible conflicts between the profitability of WESH-TV and its responsibility to serve the public interest. Thus, it is far from clear whether major decisions regarding WESH-TV's policies and operations will be made with sufficient sensitivity to the licensee's public interest obligations. Moreover, as previously noted, the adverse conclusions which must be drawn under the main studio move issue corroborate the finding here of a general tendency to misuse subsidiaries for financial gain.

The majority's refusal to assess the impact of the mail fraud issue in terms of the management interrelationship between CCI and its broadcast and PDS subsidiaries is unsupportable. The court of appeals has clearly rejected as factually false the argument that there was no connection between the broadcast and PDS subsidiaries besides common ownership.³⁵ The majority's retreaded analysis indicating that there was no integration of "operating" personnel between the PDS and broadcast subsidiaries, and that "Functionally," the subsidiaries were linked "only" by their common relationship with CCI, while notable for its linguistic pumping, holds no more air than the Commission's earlier flat. It is precisely the subsidiaries' "common relationship with CCI" and with Whatmore and Harding that is crucial here from the standpoint of both the record and the court's remand order, and it is arbitrary and capricious—and bordering on contumely—for the majority

³⁴See, e.g., Tr. 3186-92, 3339-41, 3350-3, 3359-63. Testimony by Lester Suhler, the president of PDS subsidiaries, further confirms that both Whatmore and Harding had broad responsibility for their operations. According to Suhler, Whatmore and Harding participated in the acquisition of the subsidiaries, the appointment of Suhler and other personnel, attended various meetings, and received complaints. Tr. 4532, 4534, 4537, 4548-9, 4551, 4555-6, 4560-1, 4568-9.

³⁵Note 25 and quotation in text *supra*.

to ignore the plain import of that record and order with an abfuscatory "functional" analysis of management structures. Having noticed, however fleetingly, that Whatmore and Harding were "aware of . . . the existence of misconduct" in the PDS subsidiaries, it is also unreasonable for the majority to refuse to pursue the implications of that awareness with the deflative observation that there is no evidence what Whatmore and Harding actively "participated in or encouraged" that misconduct. At bottom, the majority's reconsideration of this issue signifies nothing but its arbitrary determination to insulate Cowles and CCI from the clear public interest implications of the PDS subsidiaries' wrong-doing.

Contrary to the majority's ultimate conclusion on this issue, the interrelationship between CCI and its broadcast and miscreant PDS subsidiaries must reflect adversely on Cowles' likely future performance as a broadcast licensee. While I do not believe this finding is so conclusive as to require Cowles' disqualification, it does require that a second substantial demerit be assessed against Cowles on a comparative basis.

B. Standard Comparative Issues

The *1965 Policy Statement on Comparative Broadcast Hearing*³⁶ has historically served as the theoretical point of departure for comparative renewal decision-making, and has been held to govern the introduction of evidence in such proceeding.³⁷ Most importantly, it has remained the Commission's basic comparative renewal guideline in light of its decision not to adopt different standards for comparative renewal proceedings in rulemaking Docket 19154.³⁸ Reference to the *1965 Policy Statement* has thus implicated the following comparative process criteria: (1) maximum diffusion of control of the mass communications

³⁶1 FCC 2d 393 (1965) [hereinafter cited as *1965 Policy Statement*].

³⁷*Seven (7) League Productions, Inc. (WIII)*, 1 FCC 2d 1597, 1598 (1965).

³⁸*In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Renewal Process (Docket No. 19154)*, Report and Order, 66 FCC 2d 419 (1977).

media (or "diversification") and (2) "best practicable service" to the public.³⁹ The component factors which have been at issue in this proceeding are diversification, integration of management and ownership (together with minority ownership), and past broadcast record.

While the majority continues to bridle at the recedentially required application of the *1965 Policy Statement* criteria,⁴⁰ it purports to apply it nonetheless, just as it purports to give Central the comparative hearing to which it is statutorily entitled. However, this formal obeisance to the rubric of the *Policy Statement* does not obscure the majority's ultimate failure to supply a reasoned analysis which will support its result in terms of applicable law and judicial precedent and the record before it.

1. Diversification

While recognizing the Supreme Court's affirmance⁴¹ the Commission's Docket 18110 decision to consider diversification of ownership primarily in the context of a general, structural rulemaking,⁴² the court of appeals nonetheless concluded that the original *Cowles* decision's devaluation of Central's "clear preference"⁴³ under this criterion effectively amounted to the trivialization of the diversification factor itself, contrary to the Commission's

³⁹1 FCC 2d at 394.

⁴⁰See, e.g., Decision at 11 n. 65. The majority's lingering discontent is at least formally muted in view of the court's discussion of the Commission's inability "to distinguish in its rules between hearings comparing only new applicants and comparative renewal hearings," 598 F. 2d at 50, and its statement that "The Commission may not, comfortably with the hearing mandate of Section 309(e), practically abandon the 1965 criteria without providing an alternative scheme affording a thorough and intelligible comparison," *id.* at 56.

⁴¹*FCC v. National Citizen's Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter cited as NCCB].

⁴²*Second Report and Order on Multiple Ownership*, 50 FCC 2d 1088, *On Reconsideration*, 53 FCC 2d 589 (1975).

⁴³This "clear preference" has been predicated on the record facts that while Central has no other media interests, there are a substantial number of co- and cross-media ownership interests attributable to Cowles. See paras. 45-50 of the majority's decision. Recent changes in the various media holdings attributable to Cowles are without decisional significance.

own stated intent to apply that factor in this proceeding. In particular, the court was critical of the Commission's theory that because the other media interests attributable to Cowles were outside Florida and the WESH-TV service area, the diversification difference between Central and Cowles was thereby minimized. The court also questioned the decision's creation of a requirement that the challenger prove specific behavioral dangers of the incumbent's concentration while, at the same time, the Commission gave the incumbent as structural merit for local "management autonomy." The court accordingly directed the Commission on remand to address "(1) the conceded relevance of diversification of media ownership in the comparative renewal context; (2) the materiality of related media interests *anywhere in the nation*; and (3) the evident hazards of relying on local management autonomy as a surrogate for diversification of media ownership."⁴⁴

The majority responds to this instruction by dutifully dropping the Commission's previous "remote interests" and "management autonomy" arguments. While the majority concedes (with little apparent enthusiasm or elation) that "We are thus left with a clear preference in favor of Central," it decides that the "significance" of this advantage "is best left" to the overall comparative evaluation.

The majority and I at least agree that Central enjoys a "clear preference" under the diversification criterion. While we disagree sharply on the "significance" of this clear advantage, I, too, leave that difference to the overall comparative evaluation.

2. Best Practicable Service

a. Integration

Cowles proposes no integration of ownership with management. Central proposes limited full-time integration as follows: Raymond A. Chambers (3.5%),

⁴⁴598 F.2d at 34 (Original emphasis).

fulltime supervisor of administration (position unrelated to programming); and Thomas W. Staed (3.5%) and Jeanne M. Goddard (3.5%), full-time General Manager and Program Director, respectively, their participation being limited to the station's formative period. Additional parttime integration proposed by Central includes another 50.8% of the shareholders in various capacities amounting to 5 to 50% of their time, with a weighted average of 7.5%. Central's integration proposal is enhanced by the local residence and civic participation of several stockholders and the minority status of George P. Schanck (3.5%, part-time public affairs advisor, now deceased) and George W. Engram (1.7%, part-time black affairs adviser), each with a record of local civic activities.

In its remand order the court observed that the Commission had vacillated far and wide in its characterization of Central's integration proposal compared with Cowles absentee-owned status—from "slight preference" to "merit" to essentially no comment. The court was also critical of the manner in which the Commission converted the structural integration issue into a functional issue of whether Cowles' claim of "management autonomy" was a satisfactory surrogate for owner-management. Concluding that the Commission had effectively abandoned the integration criterion contrary to its professed formal analysis, the court's remand order told the Commission to reconsider its findings on this issue.

In response to these judicial concerns, the majority finds that Central is entitled to only a "slight advantage" over Cowles under the integration criterion because Central has proposed little full-time permanent integration—i.e., 3.5% full-time permanent unrelated to programming compared limited to the station's formative period.⁴⁵ As in the case of

⁴⁵Although no certainty attaches to the inference, it appears that the majority has at least temporarily abandoned the Commission's previous reliance on "management autonomy" as a theory for minimizing challengers' integration advantages.

the diversification analysis, the majority leaves the "weight" to be accorded Central's integration advantage to the overall comparison.

While I will return to the full significance of Central's integration advantage in the overall comparative evaluation, a preliminary observation is appropriate here. Although I agree with the majority's statement that the amount of full-time integration is the most important consideration in evaluating an applicant's proposal, what would therefore ordinarily be only a "slight" integration advantage in Central takes on added significance in light of Cowles' main studio move violation. As previously detailed,⁴⁶ Cowles' non-integrated management has "autonomously" responded to the "commercial lure" of Orlando and has diverted substantial personnel and investment there, away from Daytona Beach. Central's integration proposal, however modest, contrasts most favorably with Cowles' propensity to forget its primary obligation to its community of license. In the same vein, the problems of management responsibility and abuse of separate subsidiaries encountered under the mail fraud issue designated against Cowles⁴⁷ enhance the comparative relevance and materiality of Central's integration advantage.

b. Cowles' Past Broadcast Record

In its original decision, the Commission initially characterized Cowles' past broadcast record as "superior," thus elevating Cowles' performance well above the "thoroughly acceptable" finding made by the ALJ. On reconsideration, the Commission re-characterized Cowles' record as "substantial" so as not to "convey the impression that WESH-TV's past programming was exceptional when compared to other broadcast stations in its service area or elsewhere."⁴⁸

⁴⁶II. A. 1. *supra*.

⁴⁷II. A. 2. *supra*.

⁴⁸62 FCC 2d at 956.

In reviewing this finding of "substantial performance," the court observed that "Although the Commission majority in its clarification, did not expressly find that Cowles' performance was *not* superior, it did decline to find that it was superior in the sense of being exceptional."⁴⁹ The court further stated: "It being conceded that Cowles' record was not exceptional, we have no quarrel with the Commission's assessment. . . ."⁵⁰

Relying on this statement in the court's remand opinion, the majority sticks to its previous assessment that Cowles' past broadcast record should be considered "substantial," i.e., more than "minimal" but less than "superior" or "exceptional."⁵¹ It defers discussion of the "significance" of this past record to its overall comparison of the applicants.

Leaving aside for the moment the matter of standards for the assessment of licensees' past broadcast records,⁵² I will agree with the majority that Cowles' programming performance during the 1966-69 license term at issue was more than "minimal" but less than "superior" or "exceptional." If the term "substantial" denotes "average" in the sense that percentages of total broadcast time devoted to news, public affairs, and local programming appear to approximate industry-wide averages, then Cowles' performance was "substantial." If "substantial" means that the incumbent can point to at least one weekly 30-minute program ostensibly affording a forum for community

⁴⁹598 F.2d at 56-57 n. 94.

⁵⁰*Id.*

⁵¹In reiterating this finding of "substantial performance," the majority admirably resists the temptation offered by Cowles to up the ante to "superior" on the basis of the "superiority" of its Orlando "auxiliary" (read *main*) studio and its reinvestment of profits (found by the ALJ to have been intended to improve its competitive position in Orlando). If the Commission gave points for attempted alchemy, Cowles would enjoy a clear preference.

⁵²I return to this persistently problematical issue of standards in the Overall Comparative Evaluation and discussion of the majority's new comparative renewal theory, pp. 43-48 *infra*.

leaders and the discussion of community problems, and several "news segment" and other interview and opinion opportunities of lesser duration, then Cowles' record was "substantial." If "substantial" means that the incumbent can secure the favorable testimonials of seven community leaders and three public officials, then Cowles was "substantial."

For purposes of this aspect of the "best practicable service" criterion, I will *assume*, along with the majority, that Cowles' past broadcast record was indeed "substantial." This assumption of a substantial "past broadcast record" refers only to Cowles' programming and apparent community acceptance. While it could be demonstrated here that Cowles' main studio move violation undercuts its showing in support of substantial performance, I will defer consideration of the impact of this rules violation (and of the character questions stemming from the PDS subsidiaries mail fraud issue) to the overall comparative evaluation which follows.

C. Overall Comparative Evaluation

In its initial remand order, the court was sharply critical of the manner in which the Commission conducted the overall comparative evaluation of Cowles and Central and, in particular, the way in which the Commission accorded Cowles a conclusive "renewal expectancy" on the basis of its "substantial" past broadcast record to the exclusion of Central's diversification and integration advantages. While noting that "the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be,"⁵³ the court stated:

The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's. In fact . . . Central prevailed on each of the

⁵³598 F.2d at 55.

questions supposedly predicting which applicant would better perform It is plain then that this record will not support a finding that Cowles would give the best practicable service.⁵⁴

Focusing on the Commission's characterization of Cowles' past record as "substantial," rather than "superior," the court further warned:

If by this time the Commission means either (1) that "substantial" service will justify renewal *more or less* without regard to comparative issues: or (2) that "substantial" performance which is not above the average is entitled to "a plus of major significance," it is plainly mistaken. We emphasize that lawful renewal expectancies are confined to the likelihood that an incumbent will prevail in a fully comparative inquiry . . . [W]e do not see how performance that is merely average, whether "solid" or not, can warrant renewal or, in fact, be of especial relevance without some finding that the challenger's performance would likely be no more satisfactory.⁵⁵

In its rehearing petition to the court,⁵⁶ the Commission argued that concerns of "industry stability" require that a "substantial" past broadcast record, such as Cowles', be given "appropriate weight" in the form of a recognizable (and controlling) "expectation of renewal" irrespective of

⁵⁴*Id.* (Original emphasis, footnote omitted).

⁵⁵*Id.* at 57-58 (Original emphasis; footnotes omitted).

⁵⁶I dissented to the Commission's decision to seek rehearing, holding the view that rearguing the merits would serve no purpose as the Commission had "failed to articulate a sufficient rationale for its decision within the four-corners of its order." Believing that the court would defer to the Commission's exercise of its discretion in the formulation of comparative renewal policy and standards, "where its actions are based on full consideration of the relevant factors and supported by reasoned opinions," I urged instead that the Commission institute an expedited inquiry "to bring clarity and certainty to our process." FCC News Release No. 8638 (October 19, 1978).

its predictive value and irrespective of any finding concerning the competing applicant's likely future performance. While the court's *per curiam* order denying the Commission's rehearing petition observed that this new argument was "at least a plausible construction of the 'public interest,'" it stated that the Commission had formulated this theory for the first time in its petition to the court, and that therefore the proper place for its initial exposition was on remand.⁵⁷ The court further admonished the Commission that if it decided "to accord weight to such non-comparative values as industry stability," it would have to "describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria."⁵⁸

On remand, the majority attempts to rise to the opportunity—or challenge—offered by the court. While acknowledging Central's advantages under the diversification and integration criteria, and recognizing that a substantial past record deserves no preference under the best practicable service criterion of the 1965 *Policy Statement*, the majority nonetheless concludes that "significant public interest detriments" would result if "substantial"—but less than "superior"—service were not awarded a "renewal expectancy" and a consequent "comparative preference." In support of this reformulated theory of "renewal expectancy," the majority cites three policy propositions relating to a perceived need for "industry stability:" (1) Because there is no guarantee that a challenger's "paper proposals" will match the incumbent's proven performance, replacing an incumbent with a challenger might be "entirely gratuitous" and could even deprive the community of an "acceptable service" by substituting an "inferior" one; (2) Licensees should be encouraged "through the likelihood of renewal" to make

⁵⁷598 F.2d at 60.

⁵⁸*Id.* at 60-61.

"quality service" investments; and (3) Comparing incumbents and challengers as if they were both new applicants could lead to a "haphazard restructuring" of the broadcast industry and consequent widespread disruption of service to the public.

Comparing this "renewal expectancy" with the structural factors of diversification and integration, the majority decides that the latter should be given "lesser weight" in comparative renewal proceedings. With respect to the diversification criterion, the majority emphasizes "the desirability of continuing meritorious service even where there would be gains in diversification by denying renewal." Here, the Supreme Court's *NCCB* opinion⁵⁹ is cited as approving the Commission's decision in Docket 18110 not to require wider-ranging newspaper/broadcast cross-ownership divestiture, and thereby also implying approval of the Commission's policy of giving diversification "secondary importance" in comparative renewal proceedings as well.

The majority accords analogous treatment to the integration criterion, observing that, as a "structural factor," it has the same disadvantage if given "heavy weight" in the comparative renewal context. Because challengers could easily structure their integration proposals to be superior to incumbent group owners, "substantial restructuring of the industry with possible disruptions of service" would result. Moreover, observes the majority, integration is only a predictive factor, and a "mentorious" incumbent has already established itself as being "sensitive and responsive to the needs of the community" and is "likely to have developed community ties.

The majority accordingly finds that if only "Cowles' preference based on substantial service" and "Central's diversification and integration advantages" were involved,

⁵⁹436 U.S. 775 (1978).

Cowles would be the "easy winner." Noting, however, Cowles' main studio rule violation, the majority intimates that the choice is "difficult." While conceding that such licensee misconduct may raise questions as to the licensee's future rule compliance and dedication to its community and may also tend to rebut its "substantial service" record, the majority concludes that the nature of the violation does not outweigh the "clear detriment involved in depriving the public of a proven incumbent." The majority minimizes the gravity of Cowles' violation with the observation that the transgression only "involved maintaining two studios and overemphasizing the importance of the Orlando studio." Finding that the violation, thus characterized, "does not clearly reflect on Cowles' continued willingness to abide by Commission rules or its continued dedication to Daytona Beach," the majority once again declares Cowles the winner and denies Central's competing application.

The majority's overall comparative analysis begins in insight and ends in illusion. The insight is that the Commission properly has the discretion to prefer a *meritorous* incumbent to a challenger with advantages of structural proposals. The illusion is that this theory is properly applicable to Cowles.

Any claim Cowles may have to a "renewal expectancy" based on a "substantial" past performance is entirely negated by the serious adverse character questions and rules violations which must be held against it. The substantial demerits which must be assigned to Cowles under the mail fraud and main studio move issues⁶⁰ heavily undercut the comparative value of its past broadcast record. The main studio move violation calls into sharp question Cowles' continuing commitment to serve its community of license and, indeed, directly contradicts the evidence on which a finding of "substantial" performance might be based. The questions arising from the mail fraud issue—which the

⁶⁰II. A. 1. and 2. *supra*.

majority totally ignores—also cast shadows on the reliability and trustworthiness of Cowles' management. Cowles, therefore, does not deserve—and cannot rationally be given—an “expectancy of renewal” which might otherwise be due an incumbent with a “substantial” past broadcast record. Under these circumstances, Cowles and Central must be compared as if they were new applicant.⁶¹ Central's advantages under the predictive diversification and integration criteria contrast precisely and favorably with Cowles' deficiencies and warrant the grant of its application.

derits own stated theory, the majority may rely on Cowles' “substantial” performance to support a “renewal expectancy” sufficient to carry the day *only* if it may rationally ignore Central's structural advantages altogether as not predictive of better performance *and* also properly set aside Cowles' main studio rule violation and the mail fraud issue as inconsequential. The record together with the court's remand order will not allow the majority to meet either condition.

Under the majority's theory of comparative renewal analysis, the predictive diversification and integration criteria may be de-emphasized because they are considered an inadequate substitute for the observable past performance of an incumbent. The ideal of an independent, entirely locally-owned and owner-supervised broadcast operation, inherently more responsive to community needs and interests, may not be entirely realized in Central's proposals. However, *Cowles' overall past record establishes no basis to presume that Central is not likely to provide*

⁶¹Cf. *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 854-59 (D.C. Cir. 1970). In *Greater Boston*, the incumbent, WHDH, was held not entitled to the renewal expectancy because it had operated, for the most part, pursuant to various temporary authorizations and was also under the cloud of principal officer misconduct. The Commission clearly has the authority to exercise its discretion to withhold a renewal expectancy where a licensee has violated laws or rules and has not performed exceptional in the past. *Id.* at 54.

better service. To the clear contrary, Cowles' nonintegrated, "autonomous" management has demonstrated a plain propensity to abdicate its primary public interest responsibilities to its community of license in favor of pursuing private commercial advantage. To borrow the words of the majority, this particular incumbent "has established itself as being sensitive and responsive" to the "commercial lure of Orlando," and has "developed strong ties" *there* by diverting its main studio and attendant resources, employment, and investment away from its community of license, Daytona Beach. On this compelling evidence, it is *not* "highly speculative" to conclude that a locally-owned licensee in Daytona Beach, even one with modest integration attributes, will significantly and substantially improve on this incumbent's performance. Indeed, this conclusion is virtually guaranteed.

Similarly, Cowles' conglomerate media interests and "managerial autonomy" at the subsidiary level have raised serious questions of ultimate licensee accountability, as well as the prospect of conflicts between the profitability of its broadcast operations and its responsibility to serve the public interest. Again, it is *not* "highly speculative" to conclude that Daytona Beach would be better and more safely served by a licensee that is not spread—or stretched—so thin. On this record, Central's "preference" under the diversification criteria is so "clear" as to be controlling and admits no qualms of "haphazard industry restructuring."

In summary, Central must be the winner and Cowles the loser in a proper overall comparative evaluation. The majority's own newly-created comparative theory will not sustain the result it reaches in this particular case. Once again, the only mental process at work here is a reflexive reiteration of a conclusive "renewal expectancy" preference for incumbency *per se*. Once again, the competing applicant is denied a fair and rational *comparative* hearing. This time, the majority's "reasoning" is not "opaque to judicial review;" it is downright diaphanous.

While my dissent rests independently on the foregoing analysis, the majority's newly-created general theory on comparative renewal proceedings raises several other serious legal and policy issues which warrant additional comment.

The majority's new theory attempts to create and justify a more or less conclusive "renewal expectancy" in favor of an incumbent licensee having a past broadcast record of "substantial" service or performance. While this critical "renewal expectancy" is given the appearance, in part, of a "comparative" factor, it is also predicated on ostensible "non-comparative" public interest considerations. It purports to be "comparative" at least in the generic sense that a "proven" record of "substantial" service is deemed of "greater weight" than the "predictive" or "paper proposal" advantages of diversification and integration. It is more fundamentally grounded, however, in "non-comparative" considerations of "industry stability:" (1) the asserted need to "encourage" incumbent licensee investments to ensure quality service "through the likelihood of renewal," and (2) the supposed danger of "haphazard restructuring" of the broadcast industry, and consequent "widespread disruption of service to the public" if incumbents and competing applicants were compared as if they were both new applicants.

This rationale for a conclusive "renewal expectancy" based on incumbent "substantial" service immediately runs into *Citizens Communications Center v. FCC*⁶² and related admonitions of the court of appeals remand order in this case. At issue in *Citizens* was the Commission's 1970 *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*,⁶³ which provided that an incumbent would obtain a controlling preference by demonstrating

⁶²557 F. 2d 1201 (D.C. Cir. 1971).

⁶³22 FCC 2d 424 (1970) [hereinafter cited as 1970 *Policy Statement*].

"substantial past performance" without serious deficiencies. If the incumbent prevailed on this "substantial performance" threshold issue, all other competing applications were to be dismissed without a hearing on their own merits. Relying on the "full hearing" requirement of Section 309(e) of the Communications Act and the decision of the Supreme Court in *Ashbacker Radio Corp. v. FCC*,⁶⁴ the court of appeals struck down the 1970 Policy Statement, holding that a challenger must be given full opportunity to show that it is comparatively better than the incumbent, even where the incumbent has a record of "substantial" service.

At the same time, just as the court in *Greater Boston Television Corp. v. FCC*⁶⁵ had recognized that there are "legitimate renewal expectancies implicit in the structure of the Act,"⁶⁶ the *Citizens* court acknowledged that "incumbent licensees should be judged primarily on their records of past performance," and that "superior performance should be a plus of major significance in renewal proceedings . . . [because] the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service."⁶⁷ In a subsequent *per curiam* clarification order, the court emphasized that its *Citizens* holding "specifically rejected the Commission's finding that 'substantial service' by the license holder warranted practically automated renewal."⁶⁸ The court also specified that it had "used the word 'superior' in its ordinary dictionary meaning: 'far above the average.'"⁶⁹

In this proceeding, the court has previously taken note of the Commission's characterization of Cowles' past record

⁶⁴326 U.S. 327 (1945).

⁶⁵444 F. 2d 841 (D.C. Cir. 1970).

⁶⁶*Id.* at 854.

⁶⁷447 F. 2d at 1213 & n. 35(Original emphasis).

⁶⁸*Citizens Communications Center v. FCC*, 463 F.2d 822, 823 (D.C. Cir. 1972), *clarifying Citizens Communications Center*, 447 F. 2d 1201 (D.C. Cir. 1971).

⁶⁹*Id.*

as "substantial," rather than "superior," and, following *Citizens*, has stated: "If by this the Commission means either (1) that 'substantial' service will justify renewal *more or less* without regard to comparative issues; or (2) that 'substantial' performance which is not above the average is entitled to a 'plus of major significance,' it is plainly mistaken."⁷⁰

Measured against these clear judicial holdings and admonitions, the majority's new theory must answer to the charge of attempted resurrection of the invalidated 1970 *Policy Statement*. Under this theory, a showing of "substantial"—not "superior"—performance gives an incumbent a "renewal expectancy" which is practically conclusive, as any diversification or integration proposals of a challenger are automatically devalued in the face of such a showing. In essence, once the Commission makes a finding of "substantial" performance, the challenger has had its "comparative hearing"—and has lost. "Substantial performance," under this theory, rises above even a comparative "plus of major significance" to a noncomparative controlling preference.⁷¹ On its face, then,

⁷⁰598 F. 2d at 57 (Original emphasis).

⁷¹Here, the majority has been warned that "The Commission may not comfortably with the hearing mandate of Section 309(e), practically abandon the 1965 criteria without providing an alternative scheme affording a thorough and intelligible comparison." 598 F. 2d at 56. While some factor other than diversification and integration might be specified to make a meaningful comparison between incumbent and challenger, the majority's decision abstains from recognizing one. "Proposed program service" might be such a factor. Although Central had the opportunity to request an issue on the comparative superiority of its program proposals and did not, the majority's instant devaluation of the diversification and integration criteria afford Central a strong argument on reconsideration that it should be allowed to make an additional showing. Recent decisions of the Commission, however, offer little hope that Central would fare any better in securing a *bona fide* comparative hearing on such a programming proposal issue. See, *WPIX, Inc.* 68 FCC 2d 381, 398-400 (Challenger assessed a "slight demerit" for its "failure to dispel the inherent doubts as to the reasonableness and reliability of its untested local programming proposal") and Dissenting Statement of Chairman Charles D. Ferris and Commissioners Joseph R. Fogarty and Tyrone Brown, 68 FCC 2d 415, 440-44. Indeed, the cynical would suggest that challengers have long been on notice—reaffirmed by today's majority decision—that the Commission

the majority's new "comparative renewal" theory is on all fours with the 1970 *Policy Statement* struck down in *Citizens*.

The majority attempts to avoid the reach of *Citizens* and the court's remand order in this proceeding by predicting its new theory of conclusive "renewal expectancy" for "substantial performance" on the 1952 amendment to Section 307(d) of the Act,⁷² the higher authority of the Supreme Court in NCCB,⁷³ and "non-comparative" public interest considerations of "industry stability." None of these proffered supports will bear the full weight of the majority's theory.

Prior to 1952, Section 307(d) of the Communications Act of 1934 provided both that the public interest, convenience, and necessity standard was applicable to license renewal, as well as initial licensing, evaluation and that "... action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."⁷⁴ In 1952, Congress amended the section by deleting the language subjecting renewal applications to "the same considerations and practice" as original applications so as to provide that renewal "may be granted . . . if the Commission finds that public interest, convenience and necessity would be served thereby."⁷⁵ The majority's

reserves the right to add, subtract or modify its existing criteria whenever necessary to renew incumbents. In any event, the majority's generic devaluation of the diversification and integration criteria leaves the clear implication that there are no factors or criteria left to apply to competing applications. The fundamental "best practicable service" standard is thus quietly to be interred, making any attempted exercise of Section 309(e) "hearing rights" by competing applicants an exercise in futility. While this may indeed be the message the majority wishes to convey, it does not have the temerity to raise this question directly, let alone the courage to try to answer it.

⁷²Communications Act Amendments, 1952, Sec. 5, 66 Stat. 614 (1952).

⁷³436 U.S. 775 (1978).

⁷⁴48 Stat. 1084 (1934).

⁷⁵Communications Act Amendments, 1952, Sec. 5, 66 Stat. 714.

decision argues that Congress thereby "approved" previous Commission "practice" in cases such as *Hearst Radio, Inc. (WBAL)*⁷⁶ and *Wabash Valley Broadcasting Corp.*,⁷⁷ such "practice," in the majority's view, being one of according a "generic" preference for "substantial" incumbent performance over diversification and integration advantages of a challenger.

This argument, however, attempts to prove too much. The court in *Citizens* previously addressed the significance of the 1952 amendment, finding an apparent Congressional intent "to guard against the inference that an incumbent's past broadcast record could not be considered at all at renewal time."⁷⁸ An intent to permit the comparative consideration of an incumbent's past record cannot be so facily equated with an intent to accord that record a conclusive non-comparative preference. As the *Citizens* court emphasized:

[T]he Communications Act itself places the incumbent in the same position as an initial applicant. Under the 1952 amendment to the Act, both initial and renewal applicants must demonstrate that the grant or continuation of a license will serve the "public interest, convenience, and necessity." The Communications Act itself says nothing about a presumption in favor of incumbent licensees at renewal hearings; . . . ⁷⁹

The majority decision's reference to the Supreme Court's *NCCB* opinion is similarly overweighted. The footnote on which the majority relief⁸⁰ merely recites the language changes made by the 1952 amendment to Section 307(d) and briefly references the relevant House and Senate Reports, neither of which in any way contradicts the

⁷⁶15 FCC 1149 (1951).

⁷⁷35 FCC 677 (1963).

⁷⁸447 F. 2d at 1206 n. 13.

⁷⁹*Id.* at 1207.

⁸⁰436 U.S. 775, 811 n. 31.

interpretation of the court of appeals in *Citizens*. Indeed, the footnote was appended by the Court in support of an interpretation much more general than that asserted by the majority: viz., "[I]n amending Section 307(d) of the Act in 1952, Congress appears to have lent its approval to the Commission's policy of evaluating existing licensees on a somewhat different basis from new applicants."⁸¹ This footnote and text will not support the majority's contention that Congress in 1952 "approved" a conclusive noncomparative preference for "substantial" performance in comparative renewal proceedings.⁸²

Moreover, the Commission "practice" which the majority's decision claims was "approved" by the 1952 amendment is not readily apparent from a review of the *WBAL* and *Wabash* cases. While the court in *Citizens* observed that the "actual effect" of these cases "was to give the incumbent a virtually insuperable advantage on the basis of his past broadcast record *per se*," it more pertinently noted that these decisions proceeded on "the unassailable premise that the past performance of a broadcaster is the most reliable indicator of his future performance."⁸³ Review of these rulings indicates that they at least purported to perform an *ad hoc comparative* evaluation of the incumbent and the challenger and did not adopt, as a formal agency "practice," a conclusive record without regard to the specific attributes of the particular competing applicant.

The interrelationship between Section 307(d) and Section 309(e) controls this issue with finality. The court of appeals *Citizens* interpretation of the 1952 amendment to Section 307(d) best reconciles the two statutory provisions with requisite definition and clarity. Under Section 307(d),

⁸¹*Id.* at 810-11.

⁸²It is a strange Congressional intent indeed that is only first discovered as the philosopher's stone by the "arm of the Congress" nearly two decades after its enactment.

⁸³447 F. 2d at 1208

as amended, the Commission need not evaluate a renewal applicant as if it were an original applicant and therefore it may properly consider the past broadcast record of the incumbent in making the requisite "public interest" finding; however, in the case of a renewal applicant and a competing applicant, the Commission must reach its ultimate public interest finding in a comparative proceeding which not only considers the incumbent's record but also accords the challenger's application the "full hearing" mandated by Section 309(e). The majority's interpretation of the 1952 amendment to Section 307(d) would effectively nullify and repeal the "full hearing" requirement of Section 309(e) as applied to competing applications, and, according to elementary principles of statutory construction,⁸⁴ it is therefore unacceptable.

The critical deficiency in the majority's latest attempt at comparative renewal theory lies, in my judgment, not so much in its erroneous views on the foregoing issues of statutory construction and hearing procedure as in its weak and vulnerable position in the continuing debate with the court of appeals over the proper indices and effects of the "renewal expectancies" which are acknowledged to be "implicit in the structure of the Act."⁸⁵ This debate now formally centers on the issue of whether it is "substantial" or "superior" past performance which should qualify an incumbent for a legitimate "renewal expectancy" and hence a "generic preference" (according to the court's formulation) in a renewal contest with a challenger. The Commission has defined "substantial" as "sound, favorable, and substantially above a level of mediocre

⁸⁴See 1A Sands, Sutherland Statutory Construction §23.10 at 231 (4th ed. 1972) ("Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its *consistent* operation with previous legislation." Original emphasis); and *id.* §22.30 at 179 ("[A]s to changing statutory law, there is a presumption against the implied repeal or amendment of any existing statutory provision. [A]n amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied.").

⁸⁵*Greater Boston*, 444 F. 2d at 854.

service which might just minimally warrant renewal," but no "exceptional" (and, by implication, not "superior"). The court of appeals has defined its use of "superior" as meaning "far above average." This proceeding is an unfortunate indication that it is likely "n'er the twain shall meet."

The majority's latest attempt to break this deadlock again invokes the Supreme Court's decision in *NCCB* as "approving" its theory that it is "substantial" incumbent performance which lays legitimate claim to a "generic" preference conclusively and automatically outweighing predictive factors, such as diversification. The majority's argument is that certain language in the *NCCB* opinion⁶⁶ recognizes "meritorious" service as creating just such a controlling "renewal expectancy," and that because "we [the majority] have always viewed substantial service as a form of meritorious service," the Court must have "had this in mind" when it used that term.

⁶⁶The language relied upon by the majority is the following: "In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proved broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectancy' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause. *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1976), cert.denied, 403 U.S. 923 (1971); see *Citizens Communications Center v. FTTI FCC*, 145 U.S. App. D.C. 32, 44 and n.35, 447 F.2d 1201, 1213 and n.35 (1971); *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, 66 FCC 2d 419, 420 (1977); n.5, *supra*. Accordingly, while diversification of ownership is a relevant factor in the context of license renewal as well as initial licensing, the Commission has long considered the past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the 'proved product' and grant renewal if the incumbent has rendered meritorious service. See generally *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, supra*." *NCCB*, 436 U.S. 775, 805-806 (1977) (Footnote omitted).

The *NCCB* Court's opinion, however, will not carry all this heavy baggage. As in its argument on the interpretation of the 1952 amendment to Section 307(e), the majority tries to prove too much, for the cited language does *not* imply the Court's approval of a *generic, controlling* preference for past performance over diversification—whether that performance is “substantial,” “superior,” “meritorious” or otherwise. The Court's opinion more specifically states that while “past performance” has been long considered “the most important factor” by the Commission, diversification is also a “relevant factor” in the comparative renewal as well as the original licensing process, thereby refuting any implication that the former factor is to be accorded an “automatic,” comparative hearing-stopping preference. As the Court observed elsewhere in its *NCCB* opinion, the Commission, in its Docket 18110 rulemaking decision, affirmed that—

[I]ssues relating to concentration of ownership would continue to be considered on a case-by-case basis in the context of license renewal proceedings. Thus, while making clear the Commission's view that renewal proceedings were not a proper occasion for any “overall restructuring” of the broadcast industry, the Order [in Docket 18110] stated that diversification of ownership would remain a relevant consideration in renewal proceedings in which common owners were challenged by competing applicants.⁸⁷

If anything, then, the Court in *NCCB* “recognized” that the Commission had envisioned particularized concentration analysis (short of overall restructuring) *as continuing to a valid subject of comparative renewal hearings*.⁸⁸ Today's majority theory therefore leaves the Commission in the bind of refusing to consider common ownership and diversification issues in comparative renewal cases because

⁸⁷*NCCB*, 436 U.S. at 788 n. 12 (Emphasis of the Commission).

⁸⁸Indeed, it may be doubted that the Commission's Docket 18110 decision would have survived appellate review without these assurances.

they have been dealt with in rulemaking, while acknowledging that its rulemaking did not deal with those issues as they are implicated in comparative hearings. This unanswerable contradiction totally defeats the majority's theory that any preference for "substantial," "meritorious," or "superior" past performance *ipso facto* prevails over diversification factors without a particularized full comparative hearing.⁸⁹

Most importantly, in the *NCCB* passage cited by the majority, the Court's general references to "meritorious" service do not so easily equate with the majority's version of "substantial" performance warranting a "renewal expectancy" in the conclusive non-comparative favor of the incumbent. While the majority says that the Commission has "always viewed substantial service as a form of meritorious service," it is far from clear that the *NCCB* court had this particular equivalency "in mind" when it generally discussed the "renewal expectancy" for "meritorious" service recognized by "both the Commission and the courts."⁹⁰ Indeed, this co-equivalency interpretation fails to generate much light or force in view of (1) the Court's failure to cite the *one* Commission comparative renewal case relied upon by the majority for its proposition *and* (2) the Court's specific affirmative citation of the court of appeals *Citizens* decision and, in particular, its discussion of "superior." What can be fairly and evenly gleaned from the *NCCB* opinion on the "substantial" versus "superior" dialectic is that the Supreme Court has chosen—perhaps wisely—to remain above the fray. For the moment, at least, the court of appeals is accordingly left with the upper hand in the continuing debate.

⁸⁹Furthermore, if one follows the majority's thesis that "recognition" in Supreme Court opinion implies Supreme Court "approval," then the *NCCB* Court's "recognition" of the Court of Appeals decision in *Citizens* on this point, at 436 U.S. 775, 782 n. 5, also defeats the majority's new comparative renewal theory.

⁹⁰436 U.S. at 805 (Emphasis added).

For the foregoing reasons, I emphatically dissent to the majority's latest attempt to circumvent the holdings of *Citizens* in near defiance of the court's explicit remand order in this proceeding. However, I am not unaffected by the aparent predicament in which the Commisison finds itself with respect to comparative renewal evaluation. As previously emphasized, the Communications Act does imply a "renewal expectancy" in favor of the incumbent for "meritorious" service, but the regulatory dilemma for the Commission is the definition of that "meritorious" level of service which warrants the recognition of an incumbent's "renewal expectancy" and a consequent "plus of major significance" in case of a comparative challenge.

The court's formulation based on "superior" service suggests a level of performance "far above the average." I believe there is a legitimate hesitation to apply this definition if "superior" performance may be measured only against a *relative* scale—i.e., "superior" relative to other licenses in the market or in the nation. Under such an interpretation of "superior," there is no assurance of a "renewal expectancy" for any particular level of "meritorious" service; "good enough" if the majority of stations are delivering that level of service, for that level is, by this definition of "superior," "average."⁹¹

This dilemma, however, is largely of the Commission's own making becuase it has consistently refused to articulate clear standards or criteria identifying a "good" or "meritorious" level of service to which *all* licensees might reasonably be expected to aspire in order to qualify for a comparative "renewal expectancy." According to such standards, "good" or "meritorious" performance might become the "average," but that average level would be properly deemed "good enough" for a legitimate renewal

⁹¹The Commission has alluded to this concern, albeit for a different purpose, in its *Report to the House Subcommittee on Communications*, *supra* note 2, at 50-51.

expectancy to be balanced as a heavy "plus of major significance" in the event of a comparative challenge.⁹²

While my reading of its opinion in *Citizens* is not free from all doubt, I believe the Court of Appeals has there indicated that the Commission has the discretion to pursue this approach:

The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service. Given the incentive, an incumbent will naturally strive to achieve a level of performance which gives him a clear edge on challengers at renewal time. *But if the Commission fails to articulate the standards by which to judge superior performance, then an incumbent will be under an unfortunate temptation to lapse into mediocrity*, to seek the protection of the crowd by eschewing the creative and the venturesome in programming and other forms of public service.⁹³

I think the danger of the "average"—i.e., the "temptation to lapse into mediocrity"—could be alleviated to the court's satisfaction *if* there were standards for an objective and reasonable evaluation of "good" incumbent performance. The court has consistently observed that the formulation of such standards is the Commission's responsibility, not the responsibility of the judiciary, and that it stands ready to defer to the Commission's reasonable exercise of discretion if and when the Commission decides to meet that responsibility.⁹⁴

⁹²The majority shows a decided tendency to identify as "substantial"—and hence, in its view, "meritorious"—a level and quality of service which the public should have a right to expect of *any* licensee as a condition for *non-comparative* renewal. This is a clearly erroneous approach to the needed development of "renewal expectancy" standards for *comparative* renewal proceedings.

⁹³447 F. 2d at 1213 n. 35(Emphasis added).

⁹⁴See *Citizens Communications Center v. FCC*, 447 F. 2d 1201, 1213 n. 35 and as clarified, 463 F. 2d 822-823; *National Black Media Coalition v. FCC*, 589 F. 2d 578, 580-81 (D.C. Cir. 1978); *Central Florida Enterprises, Inc. v. FCC*, 598 F. 2d 37, 44, and 598 F. 2d 58, 60-61 (D.C. Cir. 1978).

It is indeed unfortunate that the Commission has failed to heed the court's recommendations and guidance,⁹⁵ because in that failure lies, at best, uncertainty and, at worst, jeopardy for all licensees. The Commission—or at least a majority of the Commission—has always preferred gestalt impressions to articulate standards, and adjectives to analysis in “evaluating” incumbents’ past records. A majority has always known “substantial” performance when it has seen it (which is to say, just about everywhere), although no one else—least of all competing applicants and reviewing courts—has been offered a clear view through its kaleidoscopic lenses. However, a distorting prescription is fairly evident in the majority’s “non-comparative” justification for its latest comparative renewal theory: “industry stability” dictates that average industry standards, *as set by average industry performance*, must compel a conclusive “renewal expectancy” for industry incumbents, which the Commission must, in its turn, recognize. Any Commission “public interest” assessment comes only at the end of this “industry stabilization” process, and then only by way of *post hoc* rationalization. While the “industry stability” considerations cited by the majority decision strongly appeal to me in theory, they are missing the necessary predicate of *Commission* standards in

⁹⁵In 1977, then-Commissioner Hooks and I called for a Commission proceeding “to define and clarify the criteria by which we evaluate a broadcast record in order to determine whether a licensee’s past performance entitles it to legitimate expectation of renewal.” *In re Formulation of Policies*, *supra* note 38. Separate Statement of Commissioners Benjamin L. Hooks and Joseph R. Fogarty, 66 FCC 2d 433, 436 (1977). To this end, we set out an outline of a proposed “checklist” indicating “those positive activities engaged in by licensees which could evidence a strong commitment to the public interest responsibilities that accompany the broadcasting privilege.” *Id.* at 436 and APPENDIX at 438. Our proposal was advanced as “a reasonable attempt to objectify and to a certain extent quantify what until now has been a process of almost absolute subjectivity.” *Id.* at 437. More recently, and in the course of this proceeding, I again called for such an effort by the Commission in lieu of its strategy of continued confrontation with the court. *Supra* note 56. While so far there have been no takers, I am hopeful that the court’s next reviewing order in this proceeding will give the Commission the necessary impetus to begin this work in earnest.

the attempted application. While I agree that in many cases "There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance," there must be rational, objective, *and articulated* standards for determining what is "in fact" the incumbent's "proven performance," that is, how and to what degree that performance has served the public interest in the "best practicable service" compared with the competing applicant's proposals. While incumbent licensees "should be encouraged through the likelihood of renewal to make investments to ensure quality service," there must be standards to know what is the "quality service" to be encouraged. Indeed, under the majority's theory, there is *no* "competitive spur" in comparative renewal proceedings because there are no standards for identifying the "dedication to the community" that is to be "rewarded." While undesirable "haphazard restructuring" of the industry might result if incumbents and challengers had to be compared "as if they were both new applicants," incumbents need not be so compared with challengers *provided* the Commission articulates *standards* for the evaluation and comparative weighing of renewal applicants' past performance which the statute already permits.

As the court has admonished, "[C]onclusory references to the need for industry stability are hardly a substitute for the statutorily mandated and particularized balancing."⁹⁶ Without the prerequisite Commission standards for assessing incumbent past performance, the majority's "industry stability" theory in effect prescribes a "renewal expectancy" based only on incumbency *per se*. At this point, the "renewal expectancy" has not only arbitrarily and capriciously shortcircuited the comparative hearing process and denied the rights of competing applicants; it has conveyed a vested property right in the incumbent's license

⁹⁶598 F. 2d at 60.

contrary to the plain letter and intent of the Act.⁹⁷ This is indeed the most "worrisome question"⁹⁸ in this case for it signifies that the Commission has learned nothing of its statutory responsibilities and accountability to judicial review despite a decade of clear instruction.

III. Conclusion

Central must be the winner and Cowles the loser in any rational comparative evaluation comporting with the Commission's statutory mandate, and this result necessarily obtains even under the majority's own defective attempt at a reformulated "comparative" renewal theory. The record of Cowles' deficiencies has not changed since the Commission's original decision, and therefore the majority's latest exercise in "administrative 'feel' " is ultimately grounded on the same sands which consumed its predecessor and precursor. It remains as plain now as in 1976 that Central's advantages against an incumbent with serious shortcomings can only be neutralized by a process of devaluation which creates an unlawful preference for the incumbent *per se* and also denies the challenger its statutory right to a "full hearing."

In its irrational compulsion to renew the incumbent, no matter how unworthy,⁹⁹ the majority has willfully forfeited any rightful claim on judicial deference to the Commission's exercise of administrative discretion and has tragically lost the opportunity to put its own house in order without further embarrassing reprimand from the court. Instead of

⁹⁷47 U.S.C. 301, 307(d); *See generally*, 598 F. 2d 37, 60-61 n. 18.

⁹⁸598 F. 2d 37, 60-61 n. 18.

⁹⁹The readily apparent fact that competing applicants file against only the n'er-do-wells of the industry—thereby proving the wisdom and validity of the Act's theory of the "competitive spur"—is lost on Commission majorities in these comparative renewal cases, who evidently see their only appointed role as one of protecting the commercial value of broadcast licenses—and licensee property rights therein—at any and all cost to the public interest and to the Commission's stature and dignity as a lawful administrative agency.

pursuing this opportunity and properly exercising its discretion, the majority inflicts yet another wound of arbitrary, irrational and capricious decision making on the comparative process in the apparent hope that if only enough of these blows are struck, the Congress may come along and put the poor writhing creature out of its misery. Despite the majority's "best efforts" in this proceeding, I remain convinced that the comparative renewal process is viable and workable, as well as the law of the land. All that is required is a Commission sensible of its statutory responsibilities. To the majority's latest exercise in insensibility:

I Dissent.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:

COWLES FLORIDA, BROADCASTING, INC.
(WESH-TV), DAYTONA BEACH, FLORIDA

For renewal license

Cowles Florida Broadcasting Co., Inc.
(WESH-TV) Daytona Beach, Florida

For modification of authorized facilities

CENTRAL FLORIDA ENTERPRISES, INC.,
DAYTONA BEACH, FLORIDA

For a construction permit

Docket No. 19168
File No. BRCT-354

Docket No. 19169
File No. BPCT-4158

Docket No. 19170
File No. BPCT-4346

Appearances

Robert A. Marmet, Gordon R. Malick and Jacob A. Stein (Marmet Professional Corporation) on behalf of Cowles Florida Broadcasting, Inc., and Cowles Communications, Inc.; *Joseph F. Hennessy, Lee G. Lovett, and Eric T. Esbenson* (Pittman, Lovett, Ford and Hennessy) on behalf of Central Florida Enterprises, Inc.; *J. Peter Luedtke, Edgar F. Czarra, Jr., Donald Harrison and Jonathan D. Blake* (Covington and Burling) on behalf of The Association of Maximum Services Telecasters, Inc.; *Gene a. Bechtel* (Arent, Fox, Kintner, Plotkin and Kahn) on behalf of witness Robert M. Goshorn; *Clyde E. Herring* on behalf of witness Lester Suhler; and *Charles W. Kelley, Kathryn S. McGovern, Thomas B. Fitzpatrick and Theodore Kramer* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: June 30, 1976; Released: July 20, 1976)

COMMISSIONER CHARLOTTE T. REID FOR THE
COMMISSION: COMMISSIONERS WILEY,
CHAIRMAN; HOOKS AND ROBINSON
DISSENTING AND ISSUING STATEMENTS.

Background

1. Before us are three applications: (a) a renewal application filed by Cowles Florida Broadcasting, Inc. ("Cowles") for Station WESH-TV, Channel 2, Daytona Beach, Florida (Docket No. 19168); (b) Cowles' application for modification of WESH-TV's facilities (Docket No. 19169); and (c) a competing application for a construction permit for operation on Channel 2, filed by Central Florida Enterprises, Inc. (Docket No. 19170).

2. Although Cowles objected to acceptance of Central's application we overruled those objections. *Central Florida Enterprises, Inc.*, 22 FCC 2d 220 (1970). In pleadings filed in conjunction with its application, Central raised various questions concerning Cowles and its operation of WESH-TV. Additionally, The Association of Maximum Services Telecasters (AMST) filed informal objections to the engineering proposals of both applicants. The applications were designated for hearing by an Order released March 10, 1971. 36 Fed. Reg. 4901. Paragraphs 20 and 26 of that Order made Cowles' stewardship of WESH-TV subject to the "substantially attuned" test of the *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424. After the Policy Statement was invalidated in *Citizens Communication Center v. FCC*, 447 F.2d 1201 (1971), the Commission amended the Designation Order by purging all references to the Policy Statement (Order, August 20, 1971, 36 Fed. Reg. 16076). And in order fully to comply with the Court's mandate in the *Citizens* case, a further "Redesignation Order" was issued on February 24, 1972.

3. With respect to Central's application, the Commission specified issues to determine:

- (a) areas and populations which might gain or lose service under Central's proposal, as compared to WESH-TV's present service, and other television services available to such areas;
- (b) in the event a loss area existed, Central's plans to ameliorate or eliminate losses and the efficacy of such plans;
- (c) whether a waiver of Section 73.610(b) of the Rules [requiring a 220-mile separation between transmitter sites for co-channel stations located in ZONE III] was justified, and if so, conditions needed to assure that equivalent protection is provided to Station WTHSTV, Channel 2, Miami, Florida; and
- (d) to (k) whether Central is financially qualified.

4. With respect to Cowles' renewal and modification applications, issues were specified to determine:

- (a) areas and populations which might gain or lose television service under the modification application, and other television services available to such areas;
- (b) in the event a loss area existed, Cowles' plans to ameliorate or eliminate actual losses;
- (c) whether a waiver of Section 73.610(b) of the Rules is justified, and if so, conditions needed to assure equivalent protection to WTHS-TV, Miami, Florida;
- (d) whether Cowles had moved its main studio without prior Commission approval;
- (e) the facts and circumstances (1) surrounding the criminal proceeding relating to purported mail fraud by five wholly-owned P.D.S. [Paid-During Service] subsidiaries of Cowles' parent, Cowles Communications Inc., (2) surrounding the companion civil proceeding relating to purported nationwide fraudulent and deceptive practices by these same PDS subsidiaries, and (3) relating to the extent, if any, of participation and/or responsibility of Cowles

- Communications, Inc. for the activities of its 5 PDS subsidiaries;
- (f) in light of the evidence adduced under issues (d) and (e), whether Cowles is qualified to be a Commission licensee, or whether it should be given a comparative demerit or demerits; and
 - (g) whether a grant of the modification application would constitute a *de facto* reallocation of Channel 2 from Daytona Beach to Orlando.

AMST was made a party to the proceeding to aid in developing the record on the applicants' short-spacing waiver requests. (Par. 6, Designation Order.) And after the Review Board amended the Designation Order to expand inquiry into the mail fraud issue, Cowles Communications, Inc. ("CCI") was made a party to this proceeding. *Cowles Florida Broadcasting, Inc.*, 32 FCC 2d 436 (1971).

5. In an Initial Decision (I.D.) released December 7, 1973, Administrative Law Judge Chester F. Naumowicz, Jr., recommended a grant of Cowles' application, and denial of Cowles' modification application and Central's competing application for a construction permit.¹ We essentially agree with the Judge's findings and conclusions, and except as modified in this Decision and in our ruling on the exceptions contained in the Appendix, the I.D. is affirmed.

6. We first consider three procedural matters. Cowles from the outset objected to acceptance of Central's competing application on the ground it was incomplete. In *Central Florida Enterprises*, 22 FCC 2d 260, we ruled that although Central had not complied fully with all the application instructions, its application was substantially

¹Central filed exceptions to the I.D., Cowles filed exceptions to portions thereof, the Bureau filed a statement in support of the I.D. and comments on the applicants' exceptions, and AMST filed a reply limited to those aspects of the exceptions involving the Judge's denial of the applicants' short-spacing waiver requests. Additionally, the applicants filed briefs in support of their exceptions, and reply briefs. Oral argument was held before the Commission on November 26, 1974.

complete and thus acceptable. Cowles renews its objections, contending that under *George E. Oleson*, 6 FCC 2d 502, Central's application should have been returned. Cowles also contends post-designation amendments bearing on Central's financial qualifications permitted by the Judge should be stricken for lack of good cause under Section 1.522(b) of the Rules, and Central's application remanded for further consideration on the financial issue.

7. Cowles's request for a remand is without merit. The Judge permitted the amendments because he did not believe they would delay the hearing. The Judge concluded Central was financially qualified, and apart from its procedural argument here, Cowles does not question the findings or conclusions on Central's financial qualifications.² In the circumstances, Cowles' request for a remand is academic and is denied.

8. Moreover, we do not think that subsequent developments respecting Central's financing require a remand. Originally, Central relied on an \$800,000 loan from the Empire Bank of Springfield, Missouri, a sum representing slightly less than half of Central's financial needs. The Empire Bank commitment expired in December, 1974. On June 18, 1975 and October 20, 1975, Central advised the Commission it was preparing a petition for leave to amend its application to reflect an \$800,000 loan from the Barnett Bank of Winter Park in substitution for the expired Empire Bank loan. The amendment reflecting the Barnett Bank loan and Central's accompanying petition for leave to amend were filed December 18, 1975. Central's petition indicated, *inter alia*, that Dennis C. McNamara had acquired a 5% stock interest in Central in consideration of his efforts in obtaining the Barnett Bank loan. (Central's petition for leave to amend also attempts to raise and

²In unopposed petitions for leave to amend its application filed May 29, 1975 and June 10, 1975, Central updated lines of credit available to stockholders Guernsey, Stephen, and Rush. Leave to amend is hereby granted. We also grant Central's petition for leave to amend its application, filed June 21, 1976, to reflect extensions of loans from the Barnett Bank of Winter Park.

relitigate matters which are utterly irrelevant here, and those matters are disregarded.) As good cause for accepting the amendment, Central argues it has acted diligently; that in any event lack of diligence is not determinative of good cause; and that where circumstances beyond an applicant's control necessitate an amendment and no unfairness is involved, the public interest is served by permitting an applicant to cure a disqualifying factor.

9. In brief comments filed December 30, 1975, the Broadcast Bureau agrees Central has shown good cause, but asks that acceptance of the amendment be deferred until Central submits affidavits from its stockholders pledging their stock to secure the new loan (as the stockholders had earlier agreed to do under the Empir Bank loan).

10. On December 21, 1975, Cowles filed its opposition to Central's petition for leave to amend, contending entirely new financial arrangements were involved and that Central has not been diligent. However, Cowles' significant argument is that because McNamara is a director of the Barnett Bank of Winter Park (and two other commonly-owned Barnett banks in the area), his acquisition of a 5% interest in Central would violate the Florida Banking Code. Consequently, McNamara would either have to forego his stock interest or pay for it.

11. Apparently in response to Cowles' opposition, on February 10, 1976, Central filed another petition for leave to amend its application. This latter petition indicates that after reviewing the provisions of the Florida Banking Code, Central rescinded its arrangements whereby McNamara would acquire a 5% stock interest; that there are no understandings to the effect McNamara will receive any equity interest in Central, and that the Barnett Bank commitment still remains in effect.

12. On February 23, 1976, Cowles filed an opposition to Central's new petition, suggesting that because McNamara was willing to obtain a loan for a consideration, rescission of such consideration may cause a failure of

consideration, resulting in Central's having no real loan commitment. Cowles also refers to alleged inconsistencies, noting the December, 1975 amendment represented McNamara already *was* then a stockholder, while the January, 1976 amendment speaks of rescinding that agreement, under which McNamara *would* have acquired his interest. In light of this, Cowles states that if the amendment is accepted, it will consider filing a petition to enlarge the issues to inquire into all the facts surrounding the new financing arrangements.

13. Also on February 23, 1976, in response to the Bureau's comments on the December amendment, counsel for Central filed a letter complying—out of abundant caution—with the suggestion made in the Bureau's comments on Central's December amendment that all of Central's stockholders should indicate they would pledge their stock with the Barnett Bank if called upon to do so by the Bank (a condition of the loan). In response, on March 1, 1976, Cowles filed comments, contending Central had not represented that the signatories of the pledge letter included all of Central's stockholders (a point on which Cowles is mistaken, because Central's February 23 letter of transmittal represents it is "signed by all Central stockholders"). Cowles also speculates over whether Central's stockholders will be willing to personally endorse any loan from Barnett Bank to Central, as may additionally be required under the loan letter. All this is said to raise a question of whether the loan letters from Barnett Bank are still valid.

14. We agree with Central and the Bureau that good cause has been shown for granting Central's petitions for leave to amend and the amendments are accepted. While delay was involved in obtaining a new loan, such delay is understandable and inevitable when a newly formed corporation such as Central seeks a loan of this size to finance a new television operation. Apart from this, there are substantial public interest reasons which justify

accepting Central's amendment. Acceptance of the amendment will avoid further delays which would result from remanding this proceeding for additional hearings on Central's financial qualifications. Notwithstanding Central's speculations to the contrary, we are satisfied that Central's new loan commitment is firm and complies with conditions specified by the Barnett Bank. Moreover, accepting the amendment will not prejudice Cowles comparatively, unless Cowles is prepared to argue it is prejudiced because it is denied the possibility of obtaining a grant by default through its opponent's disqualification, an argument we have repeatedly rejected over the years. See *WHCN, Inc.*, 26 FCC 2d 880 (Rev. Bd., 1970). See also *Brown Broadcasting Co., Inc.*, 12 FCC 2d 189 (1968), where, in a comparative context, we stated that applicants have often been permitted to eliminate potentially disqualifying factors, and where an opportunity to amend was granted *after* the Review Board had granted an application upon review of exceptions. See also *United Television Co., Inc.*, 34 RR 2d 1465 (1975). In view of the foregoing, Central's petition for leave to amend, filed December 18, 1975, and the further petition for leave to amend, filed February 10, 1976, are granted, and the amendments to the application, as amended, are accepted.

15. The second procedural matter does not require extended discussion. After release of the I.D., the Broadcast Bureau requested that any grant of Cowles' applications be conditioned on the outcome of certain criminal proceedings against Dwayne O. Andreas (a CCI director) prosecuted under the Corporate Campaign Contribution Act. In view of the judgment of acquittal (a copy of which was filed with the Commission) entered by the U.S. District Court for the District of Minnesota on July 11, 1974, the Bureau's request for a further condition is moot and is accordingly dismissed.

16. The third procedural matter is more complicated, and involves AMST's desire to withdraw as a party. AMST participated fully in this proceeding as a party on the issue

of the applicants' short-spacing waiver requests, a matter considered below. Long after the record was closed, and several months after oral argument (in which AMST also participated), we issued on April 15, 1975 a *Notice of Inquiry in Docket 20418*, 52 FCC 2d 618. It is unnecessary to discuss that *Inquiry* at length, beyond noting that it seeks comments on the technical and financial feasibility of implementing an Office of Telecommunications Policy (OTP) plan to add new VHF stations in the top 100 markets. If, as we noted in the *Notice of Inquiry*, a sufficiently compelling record is developed in Docket 20418, many of the existing technical assumptions on which the present table of television assignments is based are subject to being reopened, including the prospect of short-spaced VHF drop-ins to increase the number of television stations. The technical aspects of the inquiry in Docket 20418 are of particular interest to AMST, a group which has participated over the years in various Commission proceedings involving television broadcast television standards.

17. On July 18, 1975, AMST filed a notice that it was withdrawing from this proceeding. Its notice was accompanied by a statement of reasons for such action (discussed below) and an affidavit of "no consideration" for its withdrawal.

18. Central then filed a motion for declaratory relief, asking us to declare that AMST's "unilateral" withdrawal from this proceeding is of no force and effect. Central's motion recites the history of AMST's participation herein up to the time the *Notice of Inquiry* was issued. Central argues AMST's dilemma stems from its participation in this restricted adjudicatory proceeding and its desire to participate on an equal footing with other participants in the unrestricted policy making inquiry in Docket 20418. Central further notes that in June, 1975, AMST discussed

with Central's counsel and Cowles' counsel AMST's belief that the *ex parte* rules were not a bar to AMST's participating fully in Docket 20418 while AMST was still a party to this proceeding. While Cowles had no objection to AMST's participating in the inquiry, Central did object.

19. Central contends an adjudicatory proceeding must be conducted exclusively on the record, and free from external pressures. Central argues that AMST cannot unilaterally withdraw, and AMST's withdrawal compels Central to file its motion for declaratory relief. Central contends the Commission must decide whether AMST can withdraw. It argues *Midwest Radio-Television, Inc.*, 17 FCC 2d 298 (1969), and *National Broadcasting Company*, 24 RR 245 (1962), are precedents against permitting AMST to withdraw. Central does not question *ex parte* presentation. But pervading its motion for declaratory relief is the fear that somehow, AMST's full participation in Docket 20418 may involve presentations which affect the issues in this case. Central argues its fears cannot be alleviated by AMST's suggestion that Central be invited to attend any meetings between AMST and decision-making persons within the Commission respecting presentations AMST makes in Docket 20418.

20. All the other parties oppose the motion for declaratory relief. Cowles argues the rules neither contemplate nor forbid AMST's withdrawal. It contends that if AMST were an applicant, its failure to further prosecute its application (i.e., to participate further) would result in dismissal of its application, and the same logic applies to an informal objector who no longer wants to participate in a hearing Cowles argues (as do also the Broadcast Bureau and AMST in their responsive pleadings) that *Midwest Radio-Television, Inc.* and *National Broadcasting Company*, *supra*, are inapposite because in both these cases the parties who were prevented from

withdrawing had been instrumental in having applications designated for hearing, both had peculiar knowledge of particular facts involved in the hearing, and both sought to withdraw before the hearing commenced. In contrast, Cowles notes AMST has submitted substantial evidence on the issues in which it is interested, which formed the basis for part of Judge Naumowicz's initial decision. Finally, Cowles contends Central's fears are only theoretical at this point, and adoption of Central's arguments would force AMST to proceed under circumstances which would put it in jeopardy of violating the *ex parte* rules.

21. The Broadcast Bureau makes substantially similar arguments. It argues AMST has completed its hearing role; thus, arguments that AMST must be ordered to remain a party are unpersuasive, and Central has cited no precedent which forces someone to remain a party *after* his obligations are discharged. The Bureau argues Central's fears concerning the *ex parte* rules are purely speculative at this point, and it is speculative to suggest AMST would comment on the merits of this case in the Docket 20418 inquiry. Finally, the Bureau refers to our Report and Order in Docket 15381, *In re Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 FCC 2d 49 (1965), respecting participation by parties to a restricted proceeding in other general proceedings.³

22. In a lengthy opposition, AMST first argues the Commission's rules do not require AMST to obtain

³In a request filed August 18, 1975, AMST has asked permission (which we hereby grant) to respond to a suggestion in the Bureau's opposition that the Commission might wish to limit AMST's participation in Docket 20418 to preclude it from making "any preference . . . to this (Daytona Beach) proceeding or to the facts and/or circumstances involved herein." AMST says its position is wholly consistent with the Bureau, and there is thus no need for advance notice or any express limitation since there will be no discussion of the Daytona Beach proceedings in connection with Docket 20418 discussions. However, AMST states that if the Commission wishes to limit AMST along the lines proposed by the Bureau, it has no objection.

approval before withdrawing as a party. In any event, if says, the hearing is over and AMST has fulfilled the role assigned to it by the Commission. AMST next argues the cases Central relies on (see para. 19, *supra*) are completely inapposite here. Finally, AMST argues Central has utterly failed to show any prejudice resulting to it by AMST's withdrawal. Here AMST first argues the *ex parte* rules were not intended to inhibit the Commission from bona fide discussion on policy matters in quasi-legislative proceedings instituted by the Commission with *any* member of the public. AMST then contrasts the short-spacing waiver requests in this case (proposed "move-ins" of an existing channel closer to Miami) to the short-spaced VHF drop-ins involved in OTP's plan. Here, the applicants request limited exceptions to existing standards, rather than a change in general policy, which will be the thrust of the *Inquiry*. AMST then recites its efforts to persuade Central's counsel that AMST's participation in Docket 20418 would not prejudice Central, its request to Central's counsel to identify in what respects Central would be prejudiced, and Central's failure to do so. AMST then notes that because of its belief that the issues in Docket 20418 are of overriding importance, it has determined to withdraw from this proceeding unless the Commission feels that it would be desirable for it to remain as a party. AMST recognizes that by withdrawing, it waives all further rights to participate in any future proceedings before the Commission or the courts involving these applications.

23. Central has filed a reply to the oppositions of the other parties. In essence, that reply contends the other parties have missed the point of its motion for declaratory relief, and reiterates Central's earlier arguments.

24. The motion for declaratory relief will be denied. As the parties who oppose Central's motion correctly note, the rules do not prevent a party to an adjudicatory proceeding from withdrawing without first obtaining Commission approval. Of course, there may be circumstances where the Commission can require the continued participation of a party in a proceeding, such as in the *Midwest Radio-Television* and *NBC* cases, *supra*, where the parties wishing to withdraw had made charges against other licensees, were instrumental in obtaining designation, and had peculiar knowledge of the facts underlying their charges. But those cases clearly are not controlling here, since, as the opposing parties note, AMST has fully carried out the hearing role assigned to it. Accordingly, it would be pointless to force continued participation, when AMST has determined its greater interests lie elsewhere.

25. We can appreciate Central's concern, by we agree with the opposing parties that such concern is at this point purely speculative, especially in light of AMST's scrupulous efforts to insure that Central's interests will in no way be prejudiced. As AMST recognizes, its withdrawal bars any further participation by it in any future proceedings on these applications. Moreover, to allay any fears on Central's part that AMST might comment on the merits of these proceedings in presentations it makes in Docket 20418, we think it advisable to adopt the limitations proposed by the Broadcast Bureau, to which AMST has indicated its lack of objection. That limitation is imposed by the ordering clause, *infra*. (See fn. 3, *supra*).

26. We turn now to the merits of the applications. The pleadings are extensive: Central has filed 333 exceptions (covering 150 pages), Cowles has filed 86 exceptions (dealing mainly with denial of its modification

application), and both applicants have filed lengthy and repetitious responsive pleadings. Additionally, we have the pleadings filed by the Broadcast Bureau and AMST. The exceptions center about four main areas: the applicants' engineering proposals, the studio move issue, the mail fraud issue, and comparative consideration of the applicants. We consider first the engineering issues, under which the Judge concluded neither applicant was entitled to any comparative preference for its engineering proposals. We will then consider the remaining issues, which are linked together because of the obvious bearing of the studio move and mail fraud issues on comparative consideration.

The Engineering Issues

27. Certain background information is necessary to an understanding of these issues. Under the television allocation scheme, Channel 2 (the WESH-TV facility) is assigned to Daytona Beach, and Channels 6 and 9 are assigned to Orlando, approximately 50 airmiles southwest of Daytona Beach. In May, 1960, the Commission authorized WESH-TV to identify itself as a Daytona Beach-Orlando station, but without relieving WESH-TV of its principal obligation to serve its city of assignment. (Cowles Exhibit No. 16.) Under the Commission's Rules, the minimum separation for co-channel VHF stations in Florida is 220 miles. At one time, the transmitter sites of WESH-TV and co-channel education Station WTHS-TV (Miami, Florida) were 228 miles apart. But in September of 1959, the Commission, with the consent of WESH-TV, permitted WTHS-TV to move its transmitter to a site 215 miles from WESH-TV's site, resulting in a short-spacing of 5 miles.

28. Under its modification application, Cowles proposes to move its transmitter 12.7 miles southeastward from its present location, to a site 22 miles south of

Daytona Beach and 21 miles northeast of Orlando. The new location is in the Osteen area, and would result in a total short-spacing of 14.7 miles between the WESH-TV sites, thus increasing existing short-spacing by 9.7 miles. Central's proposed transmitter site is also in the Osteen area and would be short-spaced 13.5 miles from the WTHS-TV site, an increase of 8.5 miles compared to the present WESH-TV site. Both applicants requested a waiver of the short-spacing requirements. But because we were unable to conclude the waivers were justified, hearing issues were specified to determine areas and populations which would gain or lose television service (and alternative television service available in such areas) under each proposal; the applicants plans, and the efficacy thereof, to ameliorate any loss of service; and whether a waiver of Section 73.610(b) of the Rules was warranted and if so, conditions needed to afford equivalent protection to WTHS-TV. Further, because a question existed as to where Cowles' main studio was located and since Cowles' modification application specified a site closer to Orlando than Daytona Beach, an issue was specified to determine whether a grant of Cowles' modification application would constitute a *de facto* reallocation of Channel 2 from Daytona Beach to Orlando. A similar issue was not needed against Central because it proposed a main studio in Daytona Beach.

29. On the basis of his findings, Judge Naumowicz first considered areas and populations which would gain or lose service under the applicants' proposals. Using AMST figures,⁴ he concluded gains under the proposed

⁴Both applicants and AMST submitted data under these issues. (Paras. 3, 5, 6 & 9, I. D.), but the Judge used AMST figures because he believed computation of areas and population within a contour is an art rather than an exact science, and absent evidence one set of computations was superior, it would be fairer to both applicants if the work of only one engineer who submitted calculations on both proposals was used. Fn. 21, I.D. Central has not claimed in its motion for declaratory relief, *supra*, that AMST's withdrawal invalidates AMST's data. Needless to say, that withdrawal in no way affects the evidence which AMST offered in this proceeding.

operations of both applicants were "quite similar," each bringing a new Grade B signal to slightly less than 190,000 persons. But he concluded none of either applicant's gain area was underserved, with all the population in both gain areas receiving three Grade B services, and most of the population receiving 4 such services. Only 1,411 persons now receive as few as two services. As for losses, he concluded 23,000 persons would lose Grade B service under Central's proposal, as against 15,639 under Cowles' proposal. But most persons losing service under either proposal would continue with a choice of at least three signals, with little difference between either proposal respecting population left with fewer than three.⁵ The Judge then concluded that differences between the proposals as to areas and populations were not sufficient to justify a preference for either applicant, and he accordingly indicated he would not consider technical characteristics of the proposals under the comparative issue.

30. Turning next to the issues specified to determine the applicants' ability to ameliorate any signal loss, Judge Naumowicz concluded both applicants had demonstrated they were reasonably likely to ameliorate any loss of service, and neither applicant was entitled to a preference for its proposal to remedy service loss.⁶

31. The Judge then considered the applicant's request for a waiver of Section 73.610(b) of the Rules, needed in view of the short-spacing between the applicants' sites and that of co-channel Station WTHS-TV in Miami.

⁵Within the respective Grade B loss areas, the following populations would be left with the indicated number of services: No remaining service—Central (666), Cowles (625); one remaining service—Central (2,676), Cowles (3,433); and two remaining services—Central (545), Cowles (572).

⁶The Judge took note of Cowles' proposal to use translator service in one community to ameliorate any signal loss. But he also pointed out, as we did in the Designation Order, that using translators to cover loss areas as wide as those involved an inefficient use of spectrum space.

Noting that an essential element for waiver of the short-spacing rule is the applicant's reason for selecting a short-spaced site (*WTCN Television, Inc.*, 14 FCC 2d 870, at 885), the Judge concluded both applicants were motivated by the same reason: a desire to attain service contours comparable to those of the two network-affiliated VHF stations in Orlando. Neither applicant claimed a waiver was needed to keep a Daytona Beach VHF station economically viable. Accordingly, the Judge viewed the applicants' desire to gain comparable contours as rooted in the applicants' private economic interests. But while the desire to stand on an equal footing with the Orlando stations was understandable, the Judge felt this desire rested on a misconception of the basic allocation scheme for the area, which allocated Channels 6 and 9 to Orlando and Channel 2 to Daytona Beach. Even though the industry might view the market as one where all three stations competed to serve both communities, the Commission had never adopted this view for purposes of channel allocations under Section 73.606 of the Rules. Channel 2 remanded assigned to Daytona Beach, the allocation scheme had not been changed by our action in permitting WESH-TV to identify as a Daytona Beach-Orlando station, and the licensee of Channel 2 took with full awareness of this fact. In the Judge's view, if competitive marketplace demands required modification of the allocation scheme, the proper remedy lay in *de jure* rulemaking to change Section 73.606, and not *de facto* changes. The Judge therefore concluded the applicants' motives for short-spacing did not constitute good cause justifying a waiver, and if good cause existed, it had to be found in the *effects* of the proposed move.

32. The Judge concluded none of the alleged desirable effects of the move justified a waiver. He conceded a new service would be brought to a large number of persons (a

point we also recognized as a "definite plus" in the Designation Order). But he noted there were numerous situations where short-spacing would increase service, and if this alone sufficed, the rule would cease to exist. The Judge then noted that under the proposals, complete City Grade coverage would be afforded to the city of assignment. However, he concluded WESH-TV's present failure to provide such a signal to 6% of Daytona Beach had not caused any actual problems. As for the plus factor of bringing a new network service to a substantial number of persons, Judge Naumowicz concluded that where (as here) virtually all such persons already receive at least three other Grade B signals, disruption of the overall allocation scheme was not warranted. If this factor were made decisive here, it would control numerous other situations and the basic allocation pattern would be broken down. Finally, the Judge concluded the applicants' ability to afford equivalent protection to WTHS-TV was not controlling, because the Commission has determined equivalent protection is not a substitute for short-spacing requirements, but merely a means of reducing interference when other public interest considerations dictate the desirability of short-spacing. The Judge then concluded since there was ". . . no showing that overriding public needs are not now being met" (Para. 160, I.D.), both waiver requests should be denied. The Judge considered the *de facto* reallocation issue specified against Cowles as essentially conclusory in nature, and then concluded that the denial of Cowles' waiver request rendered this issue moot. (Para. 189, I.D.)

33. AMST and the Broadcast Bureau support denial of the waiver requests as vital to preserving continued integrity of the basic allocation scheme. The applicants—and Cowles in particular, the bulk of whose exceptions go to denial of its modification application—contend the Judge erred.

34. We consider Central's arguments first, which are relatively brief. Central first excepts to the Judge's reliance

on AMST data, rather than the applicants' figures. Central notes its consulting engineer prepared his data pursuant to the *Report & Order re Interim Policy on VHF Television Channel Assignments (Docket 13340)*, 21 RR 1695, and 21 RR 1709 (1961).⁷ It argues this methodology resulted in superior accuracy because rather than relying simply on assumed uniform population distribution in areas surveyed, Central's engineer traversed the area (at least accessible areas) to observe residences, locations and orientation of outside antennas. Central contends this methodology is entitled to a comparative preference. Central also argues that because Cowles did not use Docket 13340 standards, Cowles' data under all the engineering issues is defective and should be denied for failure of proof. Central also views Cowles' modification application as nothing more than the "final step" of an unauthorized move of Channel 2 from Daytona Beach to Orlando. Referring to the substantial numbers who would gain new Grade B service under its proposal, air space considerations which restrict it in its site choice⁸ and the need for a relatively large area to accommodate the station's facilities, Central contends its waiver request should be granted.

35. Cowles' argument under this issue is more elaborate. Cowles first alleges the record shows ten public benefits would flow from grant of a waiver, but the Judge responded to only 5 of these and failed to distinguish shortspacing waivers sanctioned in *WTCN Television, Inc., supra*, and *WTEV Television*, 45 FCC 163, *aff'd*, *Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 25 RR 2103. Cowles cites *Versluis Radio and Television, Inc.*, 9 RR 1123, for the proposition city-grade signal coverage of the entire community of license is essential to the television

⁷A Docket proceeding relied on elsewhere by Cowles, and hereinafter simply referred to as "Docket 13340."

⁸The Designation Order accorded Central the right to specify another site in the event it prevailed at the hearing and its waiver request was denied.

licensing scheme and licensees have flexibility in locating transmitters so long as proper coverage of the community of assignment is afforded. It then argues that providing full city-grade coverage and the public benefit in grouping all area tall towers at one site amply justify a waiver.⁹

36. Cowles next takes issue with the Judge's conclusions that the applicants were motivated by a desire to achieve competitive equality with the Orlando stations, contending the Judge would limit short-spacing waivers to situations where a station is in economic *extremis*. Basing its arguments variously on the Sixth Report & Order, the interim VHF "drop-ins" in Docket 13340, *WTCN Television*, *supra*, and other cases, Cowles argues the Commission cannot arbitrarily prevent stations licensed to smaller communities from competing for audiences in larger, adjacent cities. Cowles then says that contrary to what Judge Naumowicz implied, there is nothing reprehensible about competition, and it would be arbitrary to lock WESH-TV forever in a technically inferior competitive position. Cowles also argues that in Docket 13340, we stressed the desirability of putting all three networks on a competitive par where possible, but the Judge failed to discuss an alleged NBC "white area" south of Daytona Beach (which would be eliminated by moving the WESH-TV transmitter to Osteen) in assessing public benefits.

37. Cowles further contends the Judge decided its waiver request against an improper standard. It refers to judicial decisions requiring the Commission to take a "hard look" at waiver requests and then quotes from *WAIT Radio v. FCC*, 418 F.2d 1153, 16 RR 2d 2107, to the effect that application of a general rule may not be in the public

⁹The grouping of tall towers is one of the public benefits the Judge allegedly failed to consider. This alleged benefit is totally without record support. Bithlo (the Channel 6 and 9 site) is approximately 20 miles from Osteen. Moreover, at oral argument, counsel for Cowles conceded that the FAA regards Bithlo and Osteen as two separate sites and he withdrew his suggestion a waiver would group all area towers at a common site. (Tr.4679-80).

interest when extended to proposed new service which will not undermine the policy basis of the rule. Arguing its site change proposal would reduce interference to WTHS-TV and noting WTHS-TV's non-objection to short spacing, Cowles contends it has overcome the negative presumption against its proposal and all it must do is carry the normal burden of proof, which it has done in the ten alleged public benefits it has listed. Cowles agrees the Judge correctly concluded a waiver hinged on good cause, but it bitterly objects to what it views as the Judge's unwarranted speculation into its motives, because, it says, motives are immaterial and the Communications Act does not require that authorizations be based on altruism. In essence, Cowles contends, the Judge ignored the real reasons for the move¹⁰ and erroneously denied the waiver because he felt Cowles was improperly motivated in wanting to serve Orlando.

38. On January 17, 1975, almost two months after oral argument, Cowles filed petition for leave to amend its modification application. Under the amendment, Cowles' proposed antenna height would be increased from 1,549 feet above mean sea level (AMSL) to 2,024 feet (AMSL), an increase made possible by a FAA Determination of No Hazard (No. 74-SO-1343-OE), issued to Cowles on December 23, 1974. As good cause for accepting the amendment, Cowles alleges it obtained FAA approval for its proposed 1,549 foot tower on January 13, 1969, but had no reason to believe until early 1974 that a tower higher than this would be permitted by the FAA. But on April 9, 1974, the FAA granted a Determination of No Hazard for a 2,049 foot tower (AMSL) near Bithlo to TV Tower, Inc., and the licensee of Channel 9 has applied to construct such a tower. Cowles alleges its engineering study for the

¹⁰The real reasons are said to be FAA denial of earlier WESH-TV tall tower proposals, the Commission's earlier grant of a short-spacing waiver to WTHS-TV, the consent of WTHS-TV to the site change here proposed, technical superiority of the Orlando VHF stations, and FAA limitations which make Osteen the only reasonable site permitting service to both cities within FAA specifications.

amendment shows the loss areas adverted to by Judge Naumowicz would be eliminated and there would be no loss of Grade B service under the amendment. This would moot the issues specified against Cowles respecting loss of television service under the modification application and efficacy of Cowles' plans to ameliorate such losses. Cowles concedes the Commission has often held it will not accept a post-Initial Decision amendment resulting in a comparative advantage. But it argues engineering differences are usually not compared unless they are significant and notes that in Par. 153 of his decision, the Judge found differences between the applicant's engineering proposals were not sufficient to indicate a preference for either. Cowles argues that because it is not seeking a comparative advantage under its amendment, increased tower height will not change this result, but will merely moot the loss issues.

39. On February 18, 1975 Cowles informed the Commission the Department of Transportation, Federal Aviation Administration, had granted discretionary review to the Bureau of Aviation, Florida Department of Transportation on the subject No Hazard Determination issued to Cowles respecting the proposed 2,024 foot tower. On February 24, 1975, Cowles informed the Commission this review had been completed and that the Department of Transportation had informed Cowles the No Hazard determination is now final.

40. All the other parties strenuously object to accepting the amendment. All cite cases respecting the principle of administrative finality and the criteria which constitute "good cause" for accepting post-designation amendments. Central argues accepting the amendment at this late stage would be an abuse of discretion and in derogation of its late *Ashbacker* rights. The Broadcast Bureau contends there is no basis for Cowles' bare assertions that its new engineering showing demonstrates loss areas would be eliminated, that

it would be "unconscionable" at this late stage to accept the amendment, and that the amendment might well affect the issues on Cowles' ability to afford equivalent protection to WTHS-TV and the *de facto* reallocation issue. AMST views the amendment as a "twelfth hour attempt" to shore up Cowles' case, which should not be accepted for both procedural and substantive reasons. In an engineering statement attached to its opposition, AMST contends Cowles has not shown the amended facilities would serve the loss area, and might well increase interference to WTHS-TV. Finally, AMST points out we rejected AMST's request for a UHF impact issue in our original Designation Order. But the increased antenna height would obviously increase the UHF impact here (almost doubling the Grade B overlap with at least one UHF station), and would thus require us to consider UHF impact anew.

41. In an effort to remove objections raised by the other parties, Cowles filed on April 2, 1975 a supplement to its petition to amend. In this supplement, Cowles concedes some of the objections raised by other counsel may be legitimate, and the purpose of the supplement is to put these questions to rest. Central and the Broadcast Bureau filed oppositions to the supplement, contending that such a supplement is unauthorized under the rules and in any event does not meet their earlier-raised objections. Cowles filed a reply in opposition to Central's opposition. On August 8, 1975, Cowles filed another supplement to its earlier petitions for leave to amend the modification application, by which it seeks to incorporate a letter of June 4, 1975 from the Department of Transportation, Federal Aviation Administration, reflecting the fact that prior to approving a 2,049 foot tower at Bithlo, the FAA had informally taken the position that 1,549 feet AMSL should be the maximum tower height within the state of Florida. Both Central and the Broadcast Bureau filed oppositions to the tendered

amendment, which contend in essence that the new amendment does not meet their earlier objections. Cowles then filed a reply to these oppositions.

42. Cowles' final engineering argument goes to the *de facto* reallocation issue. Cowles argues the Judge's conclusions that his denial of a waiver rendered the *de facto* reallocation issue moot is procedurally defective because it is based on no findings. On substantive grounds, Cowles notes it cannot ignore a major community within its service area. It argues allocations are based on local service, which is evidenced by main studio location and principal city service. If these criteria are met, a station can locate its transmitter anywhere and still provide Section 73.606 service. *Gulf Television Co.*, 20 FCC 734 and *WKST, Inc.*, 23 FCC 354. Cowles claims the only decision in which a court found that a question of *de facto* reallocation existed was *Louisiana Television Broadcasting Corp. v. FCC*, 347 F2d 808, 5 RR 2d 2025, a case which it contends differs radically on its facts. Cowles further contends that although both applicants propose an Osteen site, a *de facto* reallocation issue was specified only against Cowles to provide an additional vehicle for examining WESH-TV's service to Daytona Beach and not because the Osteen site presented intrinsic dangers of *de facto* reallocation.

43. We consider first Cowles' petition for leave to amend its application to reflect the proposed antenna height increase. That petition must be denied. We agree completely with Central, the Bureau, and AMST that accepting the Amendment at this late stage would be wholly inappropriate. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (1970). In effect, Cowles seeks a grant without hearing of its modified proposal. Such a grant would not be in the public interest because obviously the amendment raises questions of fact and possibly new issues (e.g., the matter of UHF impact) which would have to be resolved in

hearing. No matter what Cowles says, its decision to increase its proposed tower height comes long after the comparative hearing has been completed. And obviously, assuming that all loss of service has been completed. And obviously, assuming that all loss of service would be eliminated under the new proposal, it is idle for Cowles to contend it would not obtain a comparative advantage under the amendment. To grant such an advantage to Cowles at this late stage would be fundamentally unfair to Central.

44. Turning to the waiver requests, we find no error in either the findings or conclusions under the engineering issues. We do not think the Judge acted unreasonably in using AMST's figures. We made AMST a party to assist in developing the record on the waiver requests. Even though there are discrepancies between the applicants' and AMST's figures, AMST's data was more complete because it went also to losses and gains within Grade A contours (which the data of neither Cowles nor Central did). We agree with the Judge that such discrepancies are not decisionally significant and stem from different methods used by Central and AMST. And beyond its misplaced claim of superiority based on Docket 13340, Central cites no precedents to the contrary.

45. *Central's argument that its engineering data is to be preferred over that of Cowles and AMST because of compliance with Docket 13340 standards is without merit. The Report and Order in that docket (21 RR 1965) and the Supplemental Report (21 RR 1709) indicate the Commission was there concerned with assigning additional VHF channels by permitting short-spacing in ten specified markets, not including Orlando-Daytona Beach. Even though "short-spacing" is an element both here and in that docket, nothing we said in Docket 13340 requires that short-spacing data be calculated exclusively under Docket 13340 standards. Accordingly, Central is not entitled to a*

preference for its engineering data, and, of course, the fact Cowles did not use Docket 13340 standards does not make for a failure of Cowles' proof under those issues.

46. Cowles' charge that a Judge ignored five of the asserted ten public benefits in denying a waiver is without merit. All points which the Judge allegedly ignored were covered at length, either explicitly or implicitly, in his Initial Decision.¹¹ Cowles is not entitled to a point-by-point description and explanation of its arguments on its own terms. Nor is there any merit (and Cowles cites no precedents) for Cowles' implied argument that procedural due process requires the trier of fact to explain every precedent cited to him. In any event, the different factual bases of the *WTCN* and *WTEV* decisions renders these decisions inapplicable. See Para. 42, *infra*. We note that at oral argument, counsel for Cowles conceded as much apropos of the *WTCN* decision.

47. Stripped now of the claim that operation from Osteen would further FAA goals by grouping all area tall towers at the same site (Fn. 9, *supra*), Cowles' next argument is reduced to the assertion that putting a city-grade signal over all of Daytona Beach for the first time amply justifies a waiver. While conceding city-grade coverage of the community of assignment is "highly desirable," the Judge said the record did not show WESH TV's failure to provide such a signal over 6% of Daytona Beach had caused any actual problems. Cowles argues this point deserves

¹¹The alleged "ignored" benefits with paragraph citations to the Initial Decision are as follows: (8) WESH-TV's signal would increase significantly in much of the Daytona Beach-Orlando areas paras. 7, 8, 9, 21, 151, 158, 159 and 160. *Point 4*: Receiving antenna orientation to all Orlando-Daytona Beach market stations would markedly improve for most residents of WESH-TV and WTHS-TV would be reduced — paras. 13, 24 to 27, 159 and fn. thereto, and 160. *Point 9*: There would be no actual loss of service — paras. 12, 13, 154 and 155. *Point 10*: WESH-TV would be better able to serve the entire population of its service area, including its city of license — paras. 7 to 13, 20, 23 to 27, and 151 to 160.

more thorough consideration. Cowles points to rapid growth in the Daytona Beach area since WESH TV was first licensed, which has put approximately 6% of the city's limits beyond predicted principal community signal contours. The thrust of its argument is that it is vital for a licensee to comply with the Commission's Rules, that Cowles wishes to comply with Section 73.685(a), but denial of a waiver prevents it from doing so.

48. We find this argument unpersuasive. The city-grade coverage argument was not initially advanced in Cowles' waiver request. Indeed, it appears this argument first surfaced almost 18 months after Cowles filed its modification application. In Cowles' Exhibit 9 (received in evidence, Tr. 745), Cowles' engineering consultant stated in his affidavit that it had been assumed in previous filings and testimony that WESH-TV's 74 dbu contour covered all of Daytona Beach, but present data showed only 94% coverage. The affiant then stated he did not know whether this resulted from a change in the city's boundary after original approval of the WESH-TV site, or whether the site was originally approved despite incomplete coverage. It is thus apparent this point did not originally loom large in Cowles' planning. But without minimizing the importance of providing complete city-grade coverage, the questions here is whether violation of the mileage separation standards is justified where the record discloses no actual problems exist (which was for Cowles to prove if they did), the lack of complete coverage is only minimal, and the origin of such lack may well rest on a factor beyond our control—a possible change in city boundaries. We hold that as between the two competing rules, continued integrity of the mileage separation rules is entitled to the greater weight. We do not think this does any fundamental violence to Sec. 73.685(a) of the Rules, and even Cowles' counsel conceded

at oral argument that providing complete city-grade coverage did not *per se* justify short-spacing.¹²

49. We turn next to Cowles' argument that it is desirable to put all area VHF stations on competitive parity. Cowles does not contend achieving competitive equality with the Orlando stations is vital to continued existence of WESH-TV. We noted in our Designation Order that Cowles made no such claim, and the Judge did the same in the I.D. Contrary to what Cowles argues, the Judge did not say competition was reprehensible, nor does the Commission bar small town licensees from competing for revenues in larger cities within a station's service area.¹³ The weakness of Cowles' arguments is that it seeks through a mixture of abstract statements on competition taken from factually different cases to elevate competition to an overriding level never articulated by the Commission. We do encourage "competitive facilities *where possible*." *Atlantic Video Corp.*, 25 FCC 2d 687, at 689, emphasis supplied. But this must be achieved consistently with the basic allocation scheme. As the Judge noted—a point studiously ignored by Cowles—Channels 6 and 9 are assigned to Orlando, and Channel 2 to Daytona Beach, and this assignment scheme remains intact until changed by *de jure* rulemaking proceedings. Unquestionably, the basic allocation scheme has built-in competitive disadvantages, as attested to by our efforts over the years to equalize competition between UHF and VHF stations, the authorizing of dual-city identification, and the proceedings in Docket 13340. But any licensee of Channel 2 undertakes operation—as the Judge noted—with knowledge of the

¹²The crucial consideration in *WTCN* justifying short-spacing was relocation of a transmitter on a common antenna farm, the desirability of which had been suggested by both the FAA and the Minnesota Department of Aeronautics. As AMST and the Bureau note, the FAA has required nothing here.

¹³Nor does this record show we have done so here. The Judge found (I.D., Para. 69) some 80% of WESH-TV's local advertising revenues are generated in the Orlando area, a finding Cowles does not dispute.

basic assignment scheme. Nor do we agree with the argument a licensee can locate its transmitter site almost anywhere so long as the city of assignment is not ignored. Adoption of this sweeping argument would inevitably lead to contour creep away from small cities of assignment toward larger communities. This would lead to a breakdown of the overall allocation scheme because, as the Judge correctly noted, a waiver here would control numerous situations where short-spacing would increase service or bring a network service to large numbers.¹⁴

50. Cowles' final short-spacing argument is that Judge Naumowicz applied an erroneous standard (a "showing that overriding public needs are not now being met") to its waiver request. In our view, the Judge took the "hard look" at Cowles' waiver request mandated by *WAIT Radio v. FCC*, 418 F2d 1153, 16 RR 2d 2107 (1969), and fully considered whether asserted benefits outweighed the competing public interest in preserving the integrity of the short-spacing rule, then decided they did not. Arguably, considering the alleged reduction of interference to WTHSTV and non-objection by the licensee, a waiver would not in and of itself undermine the policy basis of the short-spacing rule. But that policy is not the only one at stake. The Commission's rules are often interdependent, and the Judge concluded a waiver would lead to erosion of the overall allocation scheme by inviting future waiver requests by similarly situated licensees. Improved service,

¹⁴The contention the Judge ignored Cowles' proposed NBC white area service in his finding is hypertechnical and decisionally insignificant. (See para. 149, where the Judge concluded both proposals would bring a first NBC Grade B service to substantial numbers.) The cases relied on to support the contention that providing a missing network service justifies short-spacing are in opposite here because they differ on their facts. While court decisions recognize the desirability of affording comparable outlets to all three networks, they do not require the absolute equality Cowles seems to demand here.

FAA requirements limiting site availability, and the need for equal technical facilities may be reasons for a waiver, as Cowles argues. But they are subsidiary reason which were considered by the Judge, and are subsumed under the real reason for the new transmitter site, namely, Cowles' desire to achieve competitive equality with the Orlando stations. The Judge's conclusion does not charge Cowles with being improperly motivated because of this reason. He merely concluded this private economic reason was not sufficient, and we agree. In our judgment, there is no substantial merit to Cowles' argument the Judge weighed its waiver request against an erroneous standard.

51. Finally, the Judge correctly ruled that denial of Cowles' waiver request rendered the *de facto* reallocation issue moot. In view of the conclusory nature of this issue, the Judge did not err in failing to make findings under this issue. Nor can we agree with Cowles that this conclusion is substantively insupportable. It is true as Cowles points out that there are several markets where commercial television stations operate from locations closer to a larger community than the smaller city of license. But Cowles makes no claim (as it did in its earlier reliance on *WTCN* and the *WTEV* decisions, *supra*) that the 13 markets it lists involved short-spacing problems. Apart from this each short-spacing waiver request stands on its particular facts, and having already determined that Cowles has not justified a short-spacing waiver, we need not reach the question of whether a move closer toward Orlando would in effect reallocate Channel 2 to Orlando. In any event, the evidence developed under the "main studios" *infra*, shows that Cowles has substantially oriented its operations to the larger Orlando market. Although Cowles argues it has no desire to abandon Daytona Beach, we believe Central and the Bureau are correct in their observations that approval of the new site would constitute the final step in reallocating

Channel 2 to Orlando on a *de facto*-basis. If reallocation is in order, it should be through *de jure* proceedings in which citizens of Daytona Beach and other interested parties are afforded an opportunity to express their views.¹⁵

*The Main Studio and Mail Fraud Issues,
Cowles' Character Qualification, and Comparative
Consideration*

52. *The Main Studio Issue.* On the basis of Central's charges, an issue was specified to determine whether Cowles had moved its main studio to Orlando. At this point, we refer to the Judge's findings (which we adopt without change) only to the extent needed to provide a backdrop for an understanding of the main studio issue. Other findings will be referred to hereinafter in connection with specific arguments advanced by the applicants.

53. Cowles' Daytona Beach studio is located just outside that city at Holly Hill. Its auxiliary studios are located just outside Orlando in Winter Park. WESH-TV serves as the NBC outlet for the Daytona Beach-Orlando market. Under technical facilities in use when Cowles acquired the station in 1966 from Telrad (and which with some modifications still exist), network programs are picked up at Southern Bell's Orlando repeater, microwaved from there to the auxiliary studios in Winter Park, and from there go by WESH-TV microwave to the WESH-TV transmitter in the Daytona Beach area. In 1960, we authorized WESH-TV to identify as a Daytona

¹⁵Cowles argues the location of WTHS-TV is the source of the short-spacing problem, and even if Channel 2 were reallocated to Orlando, any operation of Channel 2 from Osteen would require a short-spacing waiver. Assuming this argument is true, it is the kind of argument which we believe is more appropriate to a *de jure* proceeding, where all pertinent arguments can be advanced, not just the private economic reasons of Cowles.

Beach-Orlando station. But, we then emphasized we were not modifying the license to change the city of assignment, nor relieving the station of its obligation to serve Daytona Beach as the principal city.

54. In his conclusions, the Judge first observed the failure of the rule defining a television main studio (Sec. 73.613) to specify that a stated percentage of a television station's programming shall originate at the main studio implied that something else is involved in defining a "main" studio. He further observed no party had cited any precedents, but this index was inconclusive because the rules do not require maintaining records as to the place of given TV studio was the "main" one. The Judge conceded local program origination plays a significant role under the precedents, but this index was inconclusive because the rules do not require maintaining records as to the place of producing local programs. Here, there was record evidence respecting the production site of local programs only for the month of January, 1970, but this did not permit an inference this month was typical for the entire license period. He therefore concluded it would be unfair to fault Cowles for failing to carry its burden of proof, because if the rules do not require keeping records, a licensee should not be faulted for failing to prove what those records would have shown.

55. Nevertheless, the Judge concluded that under the commonly accepted meaning of "main" (principal, chief, first in rank, etc.), not a single factor advanced by Cowles in defining "main studio" favored Holly Hill, the site of the Daytona Beach studios. For the single month for which record evidence was available (January, 1970), a "significantly greater amount of programming was produced at Winter Park than at Holly Hill." (I.D., para. 176.) Hours of operation were longer at Winter Park, a fact

whose significance was lessened because Orlando is the network reception point. (I.D., para. 177.) Substantially more persons were regularly employed at Winter Park, the significance of which was again lessened by Orlando's network reception status. (I.D., para. 178.) A majority of the station's officers had offices at Orlando, which suggested Cowles itself tacitly recognized Winter Park is where the station's principal business is transacted. Nor, the Judge concluded, could this be attributed to middle-level employees' suiting personal conveniences and it could not have been lost on those engaged in day-to-day operations that the former General Manager (Thomas Gilchrist) had been fired because of insufficient concentration on the Orlando community. (I.D., para. 179.) Finally, 59% of the station's physical assets were allocated to Winter Park, and only 15% to Holly Hill. (I.D., para. 180.)

56. The Judge then concluded all these factors led "inescapably to the conclusion that Cowles treats its Winter Park facility as its principal place of business." (I.D., para. 181.) In assessing the significance of this, the Judge took into account mitigating factors. First, there was little evidence the main studio move involved a deliberate corporate decision to defy the Commission's Rules. The Winter Park facility was already substantially important when Cowles bought the station. While no single decisive act "tipped the balance" in favor of Winter Park, the "commercial lure of Orlando" led to a series of changes "collectively sufficient to result in a *de facto* move of the main studio." (I.D., para. 182.) The Judge next concluded it was significant WESH-TV had not failed to provide acceptable service to Daytona Beach. The Holly Hill studios were materially improved, very substantial amounts of local programs were produced at Holly Hill, and there was no record evidence of any complaints of inadequate

service to Daytona Beach. The Judge accordingly concluded the *de facto* move of the main studio had not resulted in the downgrading of service to Daytona Beach which Section 73.613 of the Rules is designed to prevent (I.D., para. 183).

57. *The Mail Fraud Issue.* This issue involves essentially Cowles' parent, Cowles Communications, Inc. (CCI); certain practices of CCI's PDS magazine subsidiaries;¹⁶ and CCI's participation in and/or responsibility for the PDS practices.

58. Since the conclusions under this issue are relatively brief, it is necessary to set out the Judge's detailed findings at some length. CCI formerly published magazines, including *Look*. Between 1955 and 1962, CCI acquired 5 subsidiaries, which by the 1967-69 period had become FDS operations. The findings detail the close relationship between CCI and the PDSs. The PDSs operated through "franchise dealers" (allegedly independent contractors) who sold to the public and were compensated on a commission basis. By the mid-1960's complaints respecting PDS sales and collection practices arose. CCI's chairman, Gardner Cowles, became aware of the problems and discussed them with CCI's Executive Committee, after which a Central Registry Code was adopted in 1968 as an industry self-policing effort. Essentially, the Code was aimed at eliminating deceptive practices and encouraging honest dealings with the public. The Judge found adherence to the code was spotty, with emphasis more on increasing sales than preventing unsavory practices. He further found that while the PDS companies made a written record of requiring franchise dealers to pledge themselves to exemplary conduct, "their day-to-day business routine

¹⁶PDS stands for Paid-During Service, under which magazine subscriber pay installments over the life of the subscription.

encouraged, if not required, those same franchise dealers to violate their pledges." (I.D., para. 99.)¹⁷ Three PDS dealers testified during the hearing on day-to-day relations between the PDS companies and dealers. The Judge found each had some bone to pick with its PDS contractor. Nevertheless, on the basis of demeanor and corroboration of their testimony by CCI's own investigation and Federal litigation he found their testimony credible and representative of the overall situation. (I.D., fn. 16.) He also found franchise dealers were independent contractors in form only, and that their activities were dictated by and known to the PDS companies.

59. Despite adoption of the Code, complaints continued to mount and CCI increased its policing efforts. It set up an investigative task force, all dealers were visited, and reported violators of the Code were terminated. By late 1969, CCI learned its PDS subsidiaries were being investigated by the Federal Trade Commission and several state Attorneys General. CCI was particularly concerned on discovering a Federal grand jury in Des Moines was hearing results of a Post Office Department investigation. After meeting with Justice Department officials in February, 1970, CCI was informed the Justice Department intended to investigate the entire PDS industry, with investigations to be held in Des Moines (where CCI was based) because CCI controlled a large part of the PDS industry.

60. In a June, 1970, meeting in Washington, CCI proposed to have its PDSs plead *nolo contendere* to mail fraud allegations to be contained in an information. But the Justice Department wanted additionally a civil decree to govern future conduct. According to the U.S. Attorney for the Southern District of Iowa (Allen Donielson, who testified in this proceeding), while the Department felt it had a solid case against the PDSs, it felt it had no case against CCI or CCI personnel. An agreement was finally

¹⁷Elsewhere the Judge found there was corporate supervision only of dealers who lagged in sales, that dealers were encouraged or coerced by the PDSs supplied "suggested spiels" which had proven successful elsewhere, and that loans from the PDSs (lifeblood to under-capitalized dealers) were withheld until a dealer accepted a PDS recommendation. (I.D., para. 93 to 99, *passim*.)

reached on January 18, 1971, when a criminal information charging 50 counts of mail fraud (10 against each PDS) was filed. The Court entered judgement and each PDS was fined \$1,000 on each count of mail fraud. In connection with CCI's contention that the *Nolo Contendere* pleas were based on a fear of adverse business consequences, Judge Naumowicz found this claim unconvincing, noting that while a trial might have been protracted, it at least carried the possibility of ultimate acquittal.

61. Five alleged victims of PDS fraud testified in this proceeding, in an attempt to establish the PDSs were guilty of the mail fraud charges to which they pleaded *nolo contendere*. But after the record was closed, the Judge granted Cowles' motion to strike this testimony, on the ground there was nothing to link any fraud to CCI, its subsidiaries, or anyone else. Under legal doctrines governing the effect of a *nolo* plea, the Judge ruled that entry of such pleas did not establish, for the purpose of this hearing, the fact that PDSs actually committed the acts alleged in the 50 counts. In view of his ruling, the Judge found there is no evidence in this record to establish that the PDSs actually committed any or all of the specific acts alleged in the information to which they pleaded *nolo contendere*. But the Judge noted that civil relief (more important in the eyes of U.S. Attorney) had also been granted and his findings incorporate the terms of the decree. The Judge finally found that CCI decided to get out of the PDS business after entry of the civil decree and by August 31, 1971, all PDS selling had ended.

62. In his conclusions, Judge Naumowicz stated the record evidence warranted a conclusion CCI acquired subsidiaries to engage in a business it must have realized held temptations for PDS personnel to commit mass fraud. He further concluded CCI's supervision to prevent fraud was ineffectual, and, while no individual fraud was proven on this record, CCI satisfied itself through its own investigations that "... fraud was rife throughout the organization" it had created. CCI's investigations came only on the eve of governmental investigations and the

Judge considered it "simply inconceivable that [CCI] could have heretofore been unaware of so widespread a corruption unless it chose to be unaware." He characterized this conclusion as "harsh" and stated had it been reached with respect to an applicant without a broadcast record, it might well be disqualifying.

63. However, the Judge noted the Commission was concerned with an applicant's non-broadcast activities only insofar as they supply some inference as to how an applicant is likely to run a broadcast station. Here, Cowles was making a full broadcast record at the very time the PDSs were engaging in improper conduct. The Judge stated how a station was run in the past is the best indicator for the future and it was unnecessary to draw inferences from the non-broadcast conduct of CCI and the PDSs. He then concluded "no decisionally material conclusion should be based on the portion of the record devoted to this issue." (I.D., para. 186.)

64. *Cowles' Character Qualifications.* We specified an issue against Cowles to determine, in light of evidence adduced under the main studio and mail fraud issues, whether Cowles should be assessed a comparative demerit or demerits. In view of his conclusion on the mail fraud, the Judge ruled no conclusions adverse to Cowles' character should be based on that issue. But he considered the main studio matter to be plainly of decisional significance. Citing his earlier conclusions (Para. 49, *supra*), he concluded the studio move was not "the product of a calculated intent to defy the Commission's authority," but rather the end product of a series of actions, each innocuous in itself and each in response to what Cowles considered a technical or commercial imperative. He noted that in a comparable situation, we had considered a forfeiture more appropriate than disqualification.¹⁸ While forfeiture was not available here, the Judge concluded the record did not call for more stringent action and concluded the studio move did not warrant disqualification of Cowles. He then deferred final

¹⁸Citing *Public Notice, Report No. 11950*, November 21, 1973, in re *WCTV*, Thomasville, Georgia.

consideration of the significance of the studio move to consideration under the comparative issue.

65. *Comparative Consideration.* Citing the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, the Judge observed that selection in a comparative hearing is based on two primary objectives: maximum dispersal of mass media control, and the best practicable service to the public.

66. The Judge first concluded it was "apparent that the advantage lies with Central" under the diversification factor. Central has no broadcast or mass-media interests. Cowles' parent, CCI, owns an AM-FM-TV combination in Des Moines, Iowa, and another CCI subsidiary owns AM-FM stations in Memphis, Tennessee. While these interests were remote from Daytona Beach, they remained a significant factor in the ultimate choice. The Judge further noted CCI owns a substantial stock interest in the New York Times Company,¹⁹ which publishes the *New York Times*, other newspapers and periodicals, and which owns broadcast interests. Further, certain CCI stockholders have substantial mass-media involvement. The Des Moines Register and Tribune Company owns 9% of CCI's stock and has an 11% stock interest in the Minneapolis Star & Tribune Company.²⁰ But the Judge concluded these related mass-media interests were of little decisional significance

¹⁹A 24.6% stock ownership in the Time Company's Class A common stock, which is not controlling interest. Para. 120, I.D.

²⁰The Des Moines Register and Tribune Company publishes daily newspapers in Des Moines and elsewhere. (I.D. paras. 120 and 123.) The Minneapolis Star & Tribune Company publishes daily newspapers in Minneapolis and elsewhere, operates a TV station in Hutchinson, Kansas, and has a 47% stock interest in an AM-FM-TV combination in Minneapolis. (I.D. para. 122.) On April 16, 1975, Cowles filed a motion to correct the transcript respecting testimony by Gardner Cowles on who votes certain stock interests in CCI, including the Register and Tribune stock interest therein. The testimony occurred at a hearing session in 1972. That motion is denied. The motion to correct the transcript of the hearing should have been addressed to the Judge, at a time long since past. We see no reason for permitting Gardner Cowles to change his testimony now, especially in view of Central's charges that the requested change is designed to advantage CCI in collateral proceedings. As Central further notes, if Cowles wishes to correct the testimony on this point, its proper remedy is to ask that the record be reopened for this purpose, which it has not done.

because CCI does not control the New York Times Company, nor does the Des Moines Register and Tribune Company control CCI. Thus, no potential existed for compelling the media involved to speak with a common voice, which meant the basic policy underlying the diversification standard was "not disserved."

67. The Judge then concluded Central's "clear" advantage on diversification need not be controlling unless Central's ability to render the best practicable service equalled or exceeded that of Cowles. And this was especially so in the present context where a grant would not increase existing media concentration. He viewed Cowles' present status as the WESH-TV licensee as evincing a prior Commission determination that Cowles' media connections were not contrary to the public interest. He further noted the Commission's desire to achieve maximum diversification had not in the past led it to use the diversification criterion under the standard comparative issue to restructure the industry. In the Judge's view, in a comparative hearing involving a renewal applicant, benefits from increased diversification had to be balanced against the public necessity for a stable broadcast industry. Accordingly, the Judge concluded that in a comparative hearing, an opportunity to increase diversification should be taken only if a competing applicant appears likely to render service at least as good as that which the public has been receiving. (I.D., para. 195.)

68. Turning to the best practicable service criterion, the Judge concluded Central's showing was "not strong." He noted full time participation by station owners in operations is of substantial importance under the *Comparative Hearing Policy Statement, supra*. But here, full time participation was proposed by only 3 of Central's shareholders, collectively owning 10.5% of Central's stock. While such participation was "not inconsequential," the integrated owners did not have the

ability to control corporate policy. Further, the proposed integration was temporary. The important positions ("more significant than any other roles [the stockholders] might undertake") of General Manager and Program Director would be held by Mr. Stead and Mrs. Goddard, respectively. But Stead would serve only in Central's "formative stages," and Mrs. Goddard only until the station is "thoroughly organized and stabilized." Given this, the Judge concluded the Commission could not assume integration benefits would continue for the coming license period, whereas the *Policy Statement* considers it important that integration proposals be adhered to on a permanent basis. Moreover, the Judge believed Central's lack of broadcast experience—ordinarily unimportant under the *Policy Statement* because this lack can be cured—took on increased significance because participation by Central's inexperienced principals was unlikely to be meaningful. In sum, the Judge noted, full time integration of management and ownership would be limited to Chambers, a 3.5% stockholder (but not an officer), proposed Supervisor of Administration. But his duties were undefined and nothing indicated the position was significant in determining the nature or content of program service. (Paras. 196 to 199, I.D.)

69. The Judge conceded several of Central shareholders would participate in management on a part-time basis, primarily as consultants, but that little weight attached to such participation under the *Policy Statement*. In his view, part-time contributions by those who are "essentially dilettantes" rarely has a material effect on overall station operations. Viewing Central's overall integration proposals as "very weak," the Judge concluded Central's owners would probably not play more than a nominal role in station affairs. (I.D., paras. 200-201.)

70. Comparing Cowles under the best practicable service criterion, the Judge noted Cowles' record of service "has been thoroughly acceptable," with substantial programming service to meet community needs and interests. Several local residents and community leaders had expressed satisfaction with the service, and there was no record evidence of any complaints as to how the station had been run, and no reason to believe future performance would be less than satisfactory. The only blot the Judge found on WESH-TV's record was the *de facto* move of the studio. Had that move been in intentional defiance of our Rules or had it lowered service to Daytona Beach, this would raise serious doubts respecting Cowles' ability to provide the best practicable service. But while the studio move was grounds for a comparative demerit, it did not support a conclusion Cowles was unlikely to continue to provide proper service to Daytona Beach. The Judge further viewed Cowles' Winter Park auxiliary studios as superior in ability to serve the WESH-TV audience residing in the Orlando area as compared to the mobile van proposed by Central for meeting Orlando-area needs. The Winter Park studios were accordingly a "definite plus" for Cowles under the best practicable service criterion.

71. Making his decisive comparison, the Judge concluded Cowles merited a "distinct preference" under the best practicable service criterion. And this preference outweighed Central's preference for the ability to reduce existing levels of concentration of mass media control. In the Judge's view, there had been no showing the present concentration which came about when we permitted Cowles to acquire circumstances, the "more compelling objective" was in selecting the applicant most likely to provide the best practicable service. He accordingly

concluded the public interest would be served by granting Cowles' renewal application.²¹

72. However, the Judge concluded it would not be in the public interest to permit the station to continue to operate in violation of the Rules. He therefore required Cowles to modify its operations so as to reconstitute Holly Hill, or some other place in Daytona Beach, as its main studio. At a minimum, records had to be kept to prove a majority of local programming is hereafter produced at the main studio in Daytona Beach. He further required Cowles to report within 60 days of release of the Initial Decision as to steps taken to comply with the main studio rule. Finally, he required that in future renewal applications, Cowles must submit a breakdown as to where its local programming originated.

73. We have set out the conclusions under the nonengineering issues in considerable detail because it is apparent from the pleadings the essential dispute is not so much over the basic findings as it is over the inferences therefrom. We consider now the applicants' arguments under these issues.

The Main Studio Issue

74. Central makes several arguments under the main studio issue. It first argues the unauthorized studio move shows Cowles is unfit to be a licensee and the Judge erred in not disqualifying Cowles. Taking note of the Judge's

²¹Pursuant to the Designation Order, the grant to Cowles was conditioned on the outcome of certain then-pending litigation involving CCI and its PDSs, instituted by the Federal Trade Commission, the States of Wisconsin, California, and Michigan, and certain Pennsylvania litigation involving a CCI subsidiary. By a letter of October 1, 1974, Cowles advised the Commission that all of the litigation referred to in the condition has now been terminated. All parties were furnished a copy of this report, and none objected to Cowles' request that the condition be deleted. We agree there is no further need for this condition, and it is accordingly hereby deleted.

requirement that Cowles reconstitute its main studios in the Daytona Beach area, Central argues the *WLBT* case is analogous and quotes language therefrom admonishing the Commission for posting "the Wolf to guard the Sheep in the hope the Wolf would mend his ways." According to Central, this is a situation where the Wolf had neither promised nor demonstrated any capacity or willingness to change his ways, but rather "*had stoutly denied...[any] misconduct.*" *United Church of Christ v. FCC*, 359 F2d 994, 7 RR 2001, at 2017, (Central's emphasis). The significance which Central attaches to the emphasized language becomes more clear hereinafter.

75. Central next disputes the conclusion that there is no firm Commission precedent as to what constitutes a "main" television studio.²² Central contends Cowles failed to advance in its favor a single main-studio criterion enunciated in *Gulf Television*. Central also takes issue with the conclusion that there is no firm basis for determining which studio produced a majority of local programming during the last license period, except for the month of January, 1970. A number of Central's exceptions go to this point, and all are related to the Judge's exclusion of exhibits wherein Central analyzed for certain periods the station logs of WESH-TV and STL logs required for the Studio Transmitter Link (STL) between Holly Hill and the transmitter site. The STL logs indicated that on certain dates, the Daytona Beach STL was not energized, sometimes for a whole day. Central contended such log entries were entitled to some weight in determining how much local programming was produced at the Daytona Beach facilities. The Judge noted other record evidence

²²In support of its argument, Central cites *Gulf Television Company*, 20 FCC 734, which were referred to in our Designation Order, as well as *Texas Key Broadcasters, Inc.*, 27 FCC 2d 269, *Ponce Television Corp.*, 18 FCC 2d 543, and *Nationwide Communications, Inc.*, 18 FCC 2d 171 and 19 FCC 2d 861. Cowles has cited the same cases in support of its argument that the studio move is not disqualifying.

showed it was unnecessary to energize the Daytona Beach STL to broadcast programs which had been produced in Holly Hill, and he rejected the exhibits as immaterial and without probative value. Central argues this exclusion was error because the exhibits show conclusively the Winter Park studios were in fact the "main" studio. Central further notes the one month (January, 1970) for which data permitted a determination percentage-wise as to the source of local program production involved programming developed after Central had leveled its allegations against WESH-TV's operations.

76. Central next takes issue with each of the factors which the Judge concluded mitigated the impact of the studio move. It notes that since Cowles acquired WESH-TV, total employees have increased at Winter Park and decreased at Holly Hill. It argues that since 1964, heavyduty microwave facilities have been available at Daytona Beach, thus making it unnecessary for Orlando to be treated as the network reception point. Central denies Cowles "materially improved" the Holly Hill facilities and contends that those studios constitute an entirely inadequate production center. Central notes the Winter Park studios were converted to full color capability first, and argues superior color video tape equipment is available only at the Winter Park studios. Central also disputes the conclusion that the community leaders from Daytona Beach were satisfied with the station's service to the community, contending this conclusion rests on the testimony of seven persons selected by Cowles. In light of all this, Central argues, there is insufficient evidence to support a conclusion that moving the main studio has not downgraded service to Daytona Beach.

77. Finally, Central takes issue with the conclusion the studio move was not the result of a deliberate corporate

decision. The relevant exceptions here involve testimony by Thomas Gilchrist, the WESH-TV General Manager who was fired by then-President Charles Brakefield because of alleged insufficient involvement in Orlando community activities. Gilchrist testified that "Brakefield said that he would close down the Daytona Beach studio if he though he could get away with it, but he knew that he couldn't; he just wanted to keep it to satisfy the day-to-day requirements he wanted to concentrate entirely on Orlando." (Tr. 1433.) Then, in a summarizing argument, Central contends that in light of all the circumstances "and especially in light of the repeated 'stout denials' of [Cowles] that it had moved its main studio," Cowles' renewal application should be denied.

78. Cowles views the Judge's conclusions under this issue in a quite different light, contending the Judge erred in concluding there had been a *de facto* move of the main studio. Cowles argues it cannot ignore major population centers in its service area, and the television "main studio" rule has no discernible limits as to permissible or impermissible conduct. Cowles lists nine types of conduct which licensees can engage in without running afoul of the main studio rule. Cowles asserts no licensee (including the licensee in *Gulf Television, supra*) has been adjudged guilty of violating Sec. 73.613(a) of the Rules. Cowles argues the only mandatory main studio guideline is that a station must originate more than 50% of local programming from the main studio, and the Broadcast Bureau did not prove the Cowles had failed to comply with this requirement.

79. Cowles states the Winter Park and Holly Hill studios operated essentially as at present when Cowles acquired WESH-TV from Telrad, and this operation was disclosed in the 1966 renewal application. Cowles disputes Central's arguments that the Holly Hill studio facilities are

inadequate, and quarrels with the Judge's conclusion that the evidence inescapably demonstrates Cowles treats Winter Park as its principal place of business. Noting that Orlando is the area's political and economic center, Cowles argues that for years, the main studio rule has been explained in terms of local program service, and Cowles' pursuit of revenues in the Orlando area does not change this result. In sum Cowles says there is no competent record evidence to support the conclusion WESH-TV failed to meet its main studio programming requirement.²³

80. The Bureau fully supports the Judge's conclusions under this issue. It agrees that Cowles over a period of time relocated the main studio, and it agrees no firm conclusions can be reached as to which studio produced a majority of local programming (except for January, 1970). The Bureau agrees Central's attempt to determine program source by comparing STL logs to program logs was unreliable and was properly rejected. It further notes Central has failed to cite a single precedent that renewal should be denied for relocating a main studio, and has failed to show Cowles did not meet Daytona Beach needs. And while the Bureau disagrees with Cowles over whether the main studio was moved, it cannot agree with Central that Cowles should be disqualified. It notes Cowles made no attempt to deceive the Commission and it argues Central's attempt to use the *WLBT* decision should be rejected because that case is not on point.

81. The diametrically opposite conclusions which the applicants ask us to reach under the main studio issue underscore a point we have already made: that the essential dispute here is over the inferences to be drawn from the basic facts. After a careful review of the record, we are convinced the Judge committed no error in his handling of the studio move issue. On the record as a whole, he

²³Cowles has filed the compliance report imposed by the Judge's condition that the main studios be reinstituted in the Daytona Beach area.

concluded the main studio had in fact been moved to Winter Park, but this move was mitigated by certain factors: the move was not in deliberate corporate defiance of the Commission's Rules, the history of the Orlando facilities under Telrad's ownership and Orlando's status as a network reception point had their decisional bearing, the Holly Hill studios had been substantially improved, substantial local programming had regularly been produced at Holly Hill, and there were no complaints by Daytona Beach community leaders charging inadequate service to the city of assignment. Our own review convinces us these conclusions are fully supported by the record, and in turn support the conclusion that there has been none of the downgrading of service to the city of assignment which Sec. 73.613 of the Rules is designed to prevent.

82. We find no substantial merit to the applicants' arguments under this issue. Central's argument that the *de facto* studio move requires disqualification of Cowles has no support in precedent or logic. As we see it, Central's position rests on a loose reading of the *WLBT* case from which it fashions its illogical "stout denial" theory. The thrust of this argument seems to be that the vigor of Cowles' denial that the main studio had ever been moved, plus the Judge's requirement that the main studios be reconstituted in the Dayton Beach area, somehow bring this case within the sweep of *United Church of Christ, supra*. We cannot agree. Certainly Cowles is free to press its position without having such "stout" denial treated as independent evidence which somehow aggravates the effect of the studio move. Moreover, this case and *WLBT* are factually inapposite. The requirement that Cowles reconstitute the main studios in the Daytona Beach area is not the equivalent of the

one-year renewal which the Court criticized in *WLBT*;²⁴ there have been no complaints here that the needs of a substantial segment of the public have been ignored by the licensee; and—unlike the *WLBT* case—the conclusions here have been reached after a full hearing.

83. We find no error in the Judge's exclusion of Central's exhibits purporting to show that the Daytona Beach STL was not energized at times. Whether the Daytona Beach STL was not energized at times was immaterial because, as the Judge noted, it was possible for programs produced at Holly Hill to be broadcast over the station's facilities without using the Daytona Beach STL. Moreover, to the extent the proffered exhibits might establish that the "auxiliary" studio was manned at times and the "main" studio was not, the evidence is cumulative. See I.D., para. 73.

84. Not do we find any substantial merit to Central's arguments which take issue with the Judge's conclusions respecting the factors mitigating the effect of the studio move. Those conclusions rest on findings which are supported by substantial evidence on the record as a whole.²⁵ However, two aspects of Central's argument deserve attention. We refer first to the Gilchrist testimony,

²⁴In its reply pleading, Central takes the Bureau to task for alleged failure to participate fully in the hearing, a master we consider below. Central is also critical because the Bureau, having first proposed that Cowles be given a short-term renewal because of the studio move, failed to except to the Judge's grant of a full-term renewal. The answer to Central's criticism is that the Bureau, as an independent party, is free to take its own position as to what course of action it believe would best serve the public interest.

²⁵In this area, Central ignores important findings of the Judge. For example, while the heavy duty microwave facilities might be available in the Daytona Beach area, the Judge found such facilities do not have the same flexibility of comparable facilities in the Orlando area. See I.D., fn. 9.

suggesting that Cowles' top management maintained the Daytona Beach studios merely for "window dressing" purposes to satisfy Sec. 73.613 of the Rules. Presumably this is the "little" record evidence (I.D., para. 182) of possible deliberate corporate defiance of the rules referred to by the Judge. If this were the sole record evidence on this point, it would put Cowles' actions in a much more serious light. However, Brakefield, who allegedly made the statement testified to by Gilchrist, denied having made the statement. It thus appears, although he did not explicitly refer to this testimony, that the Judge found Brakefield the more credible witness and considered Gilchrist's testimony an insubstantial basis for concluding the studio move was the product of a deliberate corporate decision to defy the rules. Since credibility was for the Judge to decide, and since he had the benefit of observing the witnesses' demeanor, we are not disposed to reach a contrary conclusion. The second point involves Central's claim that community leaders who expressed satisfaction with WESH-TV's service to Daytona Beach were selected by Cowles and were not a representative cross-section of the community. While Central obviously disagrees with the conclusion drawn from the testimony of these community leaders, it is silent respecting its own failure of proof on whether the studio move had resulted in a downgrading of service of Daytona Beach. If in fact such downgrading had occurred, it was incumbent on Central to establish this point through its own witnesses. Having failed to come forward with any witnesses who could dispute the

testimony of the community leaders who testified for Cowles, that testimony stands uncontradicted and Central is in no position now to complain. Its disagreement with the conclusions does not establish that service to Daytona Beach was downgraded.²⁶

85. By the same token, we are not impressed by Cowles' arguments under this issue. What Cowles essentially seeks is a softening of the conclusions and a determination that the studio move never occurred, with a view to removing the

²⁶Our determination respecting the studio move issue is not altered by the letter from Central's counsel, dated December 2, 1975. Counsel requests that the letter be associated with the files of this proceeding. That letter encloses a copy of a release put out by the Katz Creative Services stating that in view of construction difficulties being experienced by the two Orlando VHF stations in connectin with their new tower, "[f]or the foreseeable future, WESH-TV remains the only Orlando stationoperating with full facilities." This release is said to evidence WESH-TV's obdurate refusal to take into account the requirements that the main studion be located in Daytona Beach. On December 30, 1975, the Broadcast Bureau filed a motion to strike this letter, contending the use of a letter in lieu of a pleading is unauthorized pleading, and the Bureau substantially agrees with Cowles' position. Central filed a lengthy and highly irrelevant opposition to Cowles' motion to dismiss on December 31, 1975, and an opposition to the Bureau's motion to strike on January 9, 1975. On January 20, 1975, Cowles filed comments on Central's opposition on the Bureau's motion to strike. The Bureau's motion to strike the letter is granted. Obviously, the letter is a completely unauthorized pleading, and the lengthy arguments which Central makes in its pleadings respecting this letter are nothing more than an attempt to relitigate matters which were covered in depth during the hearing and later. The letter is not a part of this record, and if Central believed the letter was of the decision significance which it appears to claim, it should have the record reopened.

comparative demerit assessed against it under the comparative issue. We think the record speaks for itself on this issue and fully supports the Judge's findings and conclusions thereunder. Accordingly, we reject Cowles' attempt to obtain these modifications of the decision in this point. We consider below the effect of the studio move on Cowles' comparative qualifications.

The Mail Fraud Issue

86. The thrust of Central's argument under the mail fraud issue is that the findings and conclusions, especially when considered together with the *de facto* studio move, provide a further ground for disqualifying Cowles. Central first cites the Communications Act for unarguable propositions that Congress intended to provide for the use—but not ownership—of frequencies, that the Commission is required to encourage the more effective use of radio in the public interest, and that affirmative public interest findings are needed before a license can be renewed. Continuing in this vein, Central next cites various court decisions to the effect the the Communications Act does not contemplate conferring property rights in a frequency, that radio frequencies are a scarce natural resource, that the paramount public interest to be safeguarded is that of the listening public, that a broadcaster is a fiduciary, that the Commission must consider all factors touching on the public interest, and that a license cannot be renewed unless the public interest would be served.

87. Against this backdrop, Central initially notes its agreement with the conclusion that fraud was "rife" in the PDSs which CCI created. Central then cites several cases holding that a crime in which fraud is an ingredient involves moral turpitude. Central then asks how any public interest finding can be made that WESH-TV should be retained by those who condoned and encouraged acts of moral

turpitude. Citing *Westinghouse Broadcasting Co.*, 22 RR 307 (1961), and *Westinghouse Broadcasting Co.*, 22 RR 309 (1961), Central contends CCI failed to establish corporate policies designed to assure proper top management responsibility for the operation of a broadcast station in the public interest.²⁷

88. Taking issue with the Judge's view on the legal effect of the *nolo* pleas, Central argues the testimony of the 5 PDS dealers revealed fraudulent conduct engaged in by CCI or its PDSs, and the Judge found this testimony "credible and representative." Central then contends that if the Judge believed the dealers, he had to disbelieve CCI. Central further notes that under this issue also, Cowles has "stoutly denied" any wrongdoing. As to what effect all this has on Cowles' character, Central contends neither the record nor law supports the Judge's conclusion that no decisionally material conclusions should be based on that part of the record devoted to the mail fraud issue. Central further charges Cowles has dissembled with the Commission, and the mail fraud permitted Cowles to generate millions in revenues, enabling it to become one of the largest media owners in the country.

²⁷These cases followed termination of Justice Department "price-fixing" suits against GE and Westinghouse, terminated on the basis of guilty and/or *nolo contendere* pleas. In view of the pleas involved, the Commission wrote GE and Westinghouse, requesting submissions on corporate policies and procedures for assuring proper responsibility of top management for operating the broadcast stations licensed to these companies. The later Commission decisions renewing (without hearing) all the licenses involved are reported at 44 FCC (Part II) 2778 (Westinghouse renewals) and 45 FCC (Part II) 1592 (GE renewals). In each case, renewal was based on the response to the Commission's earlier letter, the non-involvement of the broadcast subsidiaries in the price-fixing schemes, and the long, outstanding broadcast record of service in the public interest by the station involved.

89. Cowles makes an elaborate six-part argument under this issue. The first sub-arguments are highly repetitious and deal in one way or another with CCI's alleged lack of direct involvement in, or legal responsibility for, the conduct of PDS dealers' activities. Cowles notes, for example, the testimony of U.S. Attorney Donielson to the effect the Justice Department felt it had no case against CCI or its personnel. It further notes neither the criminal information nor civil complaint made any charges against CCI. Cowles takes issue with the Judge's findings that the PDS dealers were independent contractors in form only. It argues Cowles acquired the PDSs in good faith and that PDS selling has been publicly accepted for over 50 years. Cowles refers to the increasing measures it took to curb undesirable PDS practices as it became aware of them, and argues there is thus no basis for the Judge's conclusion Cowles chose to remain unaware of misconduct. Cowles' final sub-argument on mail fraud is that there is no finding—or supporting evidence—that there was any connection between the broadcast operations and CCI's conduct in its PDS operations. Thus, Cowles contends, CCI's common ownership of Cowles and the PDSs is not sufficient to attribute any PDS activities to Cowles or CCI's other broadcast properties.

90. All these sub-arguments are pointed to the Judge's ultimate conclusions (I.D., paras. 184-186) on the mail fraud issue. Cowles views the conclusion that CCI acquired subsidiaries for the purpose of engaging in a business which it must have realized would tempt those doing its work to engage in mass fraud as cynical, without record support, and thus an unreasoned inference. It also attacks the Judge's conclusions that CCI's supervision to

prevent fraud was ineffectual, and that CCI's own investigations revealed fraud was rife throughout the PDSs. Cowles argues CCI's delegations of responsibility to PDS management was proper and nothing suggests CCI deliberately isolated itself from knowledge of PDS practices. It argues the Judge simply erred in finding fraud was rife, because CCI neither considered the practices fraudulent, nor of such prevalence as to be "rife." Cowles argues these conclusions disregard the evidence, the dealers' testimony, and Donielson's testimony, and it speculates the Judge so concluded solely because of his personal belief CCI did not act soon enough and its corrective measures proved ineffective.

91. Continuing this line of argument, Cowles says two fundamental findings dictate a conclusion CCI committed no fraud. The first is U.S. Attorney Donielson's testimony (I.D., para. 104 and foot note 18). The second is contained in a set of findings (paras, 197 to 110 of the I.D.) in which the Judge found there was no record evidence to prove the PDSs had actually committed any of the fraud charged in the 50 counts of the criminal information. Cowles says these findings mandate a conclusion CCI committed no fraud, and it asks us to articulate such a conclusion.

92. Finally, Cowles takes note of the Judge's conclusion (para. 186) that the Commission is concerned with non-broadcast activities of applicants only insofar as they might supply some inference as to how any applicant is likely to run a station. But Judge Naumowicz concluded that inasmuch as Cowles was making a full broadcast record at the very time the PDSs were engaged in improper conduct. Cowles' broadcast record (the best indicator of how a station would be run in the future) made it

unnecessary to attempt to draw inferences from the non-broadcast conduct of CCI and its non-broadcast subsidiaries. Cowles argues this conclusion reflects the substance of the Broadcast Bureau's Proposed Conclusion 21, which recognized there was no evidence CCI's PDS conduct carried over to the broadcast operations or would in the future taint Cowles' and CCI's operation of WESH-TV. Cowles contends the Judge's conclusion can be misinterpreted to mean the mere existence of a past good broadcast record suffices to immunize an applicant against any misconduct in non-broadcast activities. Accordingly, Cowles asks that the conclusions be recast to make it explicit there is no record evidence of any link between Cowles' operation and those of the PDSs, and no evidence such conduct has carried over into past operations of CCI's broadcast stations, or will taint operations in the future.

93. The Broadcast Bureau takes a position midway between the applicants. In general, the Bureau supports the Judge's findings and conclusions under the mail fraud issue, and argues they more accurately reflect the evidence of record than the selective, self-serving modifications which Cowles seeks. But the Bureau does not agree with Central that the PDS activities require disqualifying Cowles. It agrees with Central that a licensee must be law-abiding, but questions Central's reliance on *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954) to support the disqualification which Central seeks. The Bureau argues the question here is not whether Cowles should be punished for fraud in CCI's non-broadcast activities, but whether the conduct was such that it cannot be entrusted as a licensee. *Report on Uniform Policy as to Violations by Applicants of the Law of the United States*, reprinted in 42 FCC 2d 399. The Bureau views Central's argument that fraud in the PDSs evidences a failure by CCI to assure proper

managerial supervision of the broadcast operations as overly simplistic. The Bureau agrees with the Judge that it was unnecessary to seek inferences as to how Cowles and CCI would run WESH-TV because of Cowles' past satisfactory Broadcast record. Finally, the Bureau contends it is not the Commission's function to visit on CCI greater sanctions than those considered appropriate by the U.S. Attorney, the Justice Department, and a U.S. District Court.

94. Cowles' reply pleading adds nothing new. Cowles reiterates its earlier arguments, and notes additionally that it furnished Central and the Bureau with the names of 187 PDS dealers. It then argues the failure of the other parties to call any PDS general manager, operating executive, or salesman supports an inference that had such persons been called, their testimony would have been unfavorable to Central and the Bureau.

95. Two aspects of Central's reply require discussion. First is the manner in which Central views the role which the Broadcast Bureau should play in a comparative hearing. Citing *Associated Press v. United States*, 326 U.S. 1 (1944) and other cases, Central charges the Bureau failed to address itself to wider implications of this case and has ignored constitutional questions implicit in the limited licensing scheme which Central believes perpetuates oligopoly in mass media ownership. Central objects to the Bureau's failure to participate in the comparative aspects of the proceeding. It argues the Bureau should have submitted findings and conclusions on all issues, including comparison of the applicants. Citing its own contentions that the limited licensing scheme requires giving consideration to minority participation in television broadcast operations, Central charges the Bureau has

professed no concern for larger issues such as media diversification. It further objects to the Bureau's failure to except to the Judge's decision striking the testimony of the alleged fraud victims, and to rulings limiting the scope of the inquiry under the mail fraud issue.

96. The second matter is the "Martinelli" incident. Martinelli was a PDS dealer and a proposed Bureau witness. The night before he was due to testify, a man who identified himself as John Martinelli called Central's counsel, the caller intimated his testimony might differ depending on whether he was paid or not, and implied the price for his testimony was negotiable. Central's counsel informed him there was nothing to negotiate, and he brought the incident to Judge Naumowicz's attention the first thing the following day. A memorandum he prepared respecting the phone call was read into the record. (Tr. 3380-3386). Martinelli was never called by the Bureau, and this incident is not referred to in the Initial Decision. Central points out that this matter was never referred to the U.S. Attorney for investigation, neither Central's counsel nor his wife (who listened to the conversation on a telephone extension) have ever been interviewed by law enforcement officials, and the Bureau never put Martinelli on the stand and never explained on the record its failure to do so. In view of this incident, Central charges the Bureau with failure to protect the integrity of the Commission's process.

97. We have already indicated our essential agreement with the Judge's conclusions under the mail fraud issue, and except as modified hereinafter, those conclusions are

affirmed. Like the main studio issue, this issue involves conflicting facts from which reasonable conclusions might be drawn either way. This again is borne out by the applicant's arguments, which are directed not essentially to the findings, but to the inferences therefrom.

98. The picture which emerges respecting the PDS operations is hardly flattering to CCI. But on the record before us, we agree that Judge Naumowicz was entirely justified in reaching the "harsh" conclusions he did. Whatever the conflict in the testimony, the findings under this issue are correct and establish conduct in the PDSs of sufficient gravity to warrant CCI's coming to Washington to negotiate *nolo* pleas with the Department of Justice on behalf of its subsidiaries. While the *nolo* pleas may provide CCI with a technical legal shield against any inferences that the PDSs engaged in outright criminal fraud, there can be no doubt the PDS practices were (as the Judge concluded) *prima facie* improper and predatory. Moreover, the record supports the main thrust of the Judge's findings that despite CCI's window-dressing efforts to cleanse the PDSs, the real emphasis was on boosting sales rather than preventing unsavory practices; that CCI's own investigations would require it be aware of these practices; that the franchise dealers were independent contractors in form only; that the system of loans from the PDSs to individual dealers gave the PDSs effective control over dealers by the power to cut off essential loans; and that the totality of the relationship between the PDSs and dealers was such as to encourage—if not actually require—the dealers to violate their own written pledges of exemplary conduct.

99. In our opinion, the weakness of Cowles' arguments lies in its selective approach. Cowles argues, for example, that the Judge was gratuitously cynical in concluding CCI acquired PDS subsidiaries to engage in a business it must have known held temptations committing mass fraud, and contends this conclusion must be overturned because it is an unreasoned inference. But Cowles ignores other important parts of the record. The record demonstrates the principal business of the PDSs was selling magazine subscriptions, including subscriptions to *Look* magazine, formerly published by CCI. It is a fair inference from the record that the financial success of PDS selling depended in substantial measure on the practices which were investigated by the Post Office Department and Department of Justice. That the PDSs could operate effectively only so long as they engaged in fraudulent practices is attested to, inferentially, by the finding (I.D. para. 133) that soon after entry of the civil decree (January, 1971), CCI decided to get out of the PDS business.²⁸ Whether or not fraud was "rife" in the PDSs is largely a matter of semantics. Whether the extent of the fraudulent practices be characterized as "prevalent," "substantial," or otherwise, this would not significantly alter the basic findings on the extent to which those practices prevailed. The same goes for the Judge's conclusions that it is inconceivable CCI could have been unaware of those practices until the government forced its hand, unless it chose to remain unaware. The record fully demonstrates CCI's ever-escalating efforts to stamp out fraud in the PDSs, which efforts permit an inference that even though CCI's eyes were opened by its own investigations, it allowed (while obtaining for appearance's sake written pledges of exemplary conduct from PDS dealers) the PDs practices to continue until the civil decree

²⁸And as U.S. Attorney Donielson had earlier (and as it turned out, accurately) predicted the civil decrees signaled the death of *Look* magazine (Tr. 4409), which expired shortly thereafter.

took the profit out of them. In short, we agree with the Bureau that the Judge's findings and conclusions were accurately reflect the actual evidence of record than the exculpatory modifications which Cowles seeks.

100. But at the same time, we are unable to accept Central's position that the conduct of CCI's PDSs requires disqualifying Cowles on character grounds. Central's reliance on the "stout denial" theory is as illogical and unpersuasive here as it is under the main studio issue. The provisions of the Communications Act and the cases referred to by Central undisputably stand for the general propositions that a licensee does not obtain ownership of a particular frequency under the licensing scheme, that licensees are expected to be law abiding, and the Commission must consider all matters which touch on the public interest. But none of these general propositions are pitched to the precise question before us: Do the non-broadcast activities of the parent corporation's subsidiaries require disqualifying Cowles? In our judgement, the only time Central focuses on this question is when it argues the Judge erred in concluding that in view of Cowles' past broadcast record, it was unnecessary to attempt to draw inferences from CCI's non-broadcast activities as to how the station would be run in the future, and accordingly, no decisionally material conclusion should be based on the portion of the record devoted to the mail fraud issue.

101. In assessing the correctness of this conclusion, several considerations must be kept in mind. Except for common ownership by CCI, there was no connection between Cowles (the WESH-TV licensee) and the PDSs subsidiaries. Nor is there anything in the record to indicate CCI used its broadcast facilities in any way to promote the subscription selling business of the PDSs. Central's counsel conceded as much at oral argument (Tr. 4669), and Central

has made no claim to the contrary. Thus, there is no basis for concluding the PDS practices tainted operation of WESH-TV in the past, and in view of the civil decree and CCI's departure from the PDS industry, the same result clearly attaches to future operation of WESH-TV. Moreover, while it is true CCI was instrumental in negotiating *nolo* pleas on behalf of the PDS subsidiaries, the undisputed testimony of U.S. Attorney Donielson was that the Government felt it had no solid case against CCI or CCI personnel.²⁹ The main interest of the Department of Justice was in obtaining injunctive relief to protect the public in the future. In fact, it appears the Justice Department, according to Donielson, made it clear to CCI during negotiations that "...you are going to pay a price for past misconduct under any circumstances with these subsidiary companies," (Tr. 4406).

102. In light of this particular background, we do not think the Judge erred in refusing to impart decisional significance to matters developed under the mail fraud issue. Nor do we believe that the mail fraud matter justifies imposing a comparative demerit on Cowles. It is clear the renewal applicant was in no way involved in the PDS practices, and judging from Donielson's testimony, the Justice Department felt that no matter what the laxity of CCI's supervision over the PDSs, there was no substantial

²⁹Donielson testified "It became clear to me, from a trial lawyer's standpoint, that our case against Cowles was not a good one." (Tr. 4367. "... And the Cowles Communications personnel — we just didn't have it." (Tr. 4368). "... From what I call a trial-strategy standpoint with Cowles, we had not developed against anything [sic] other than Suhler [the CCI director who served as President of each of the 5 PDSs], and that was very weak, and we didn't get anything against the other parts of Cowles Communications ..." (Tr. 4410-4411). "We just had not developed a good case against Cowles in the mail fraud Mr. Suhler was even problematical, but the civil injunction could be effective." (Tr. 4414).

criminal case against CCI or its personnel. What Central asks us to do is to attribute the sins of the PDSs to CCI, and then visit them on Cowles' head. We cannot agree with this approach. As the Bureau correctly notes, it is not our function to mete out harsher sanctions than those considered appropriate (on the basis of information developed by the Post Office Department's investigation) by the U.S. Attorney, the Department of Justice, and a U.S. District Court. If those arms of the Government with direct and intimate jurisdictional concern with mail fraud matters considered the sanctions adequate, we see no reason to add to them. *Report on Uniform Policy as to Violations of the Laws of the United States, supra*. As we said in the *Westinghouse Station License Renewals* proceeding (where we considered the involvement of Westinghouse's non-broadcast subsidiaries in a price-fixing conspiracy valued at \$1,750,000,000 annually), it is not our function to impose additional punishment for such violations of law. (44 FCC 2d (Part II) 2778, at 2784.) Accordingly, we hold that the Judge did not err in refusing to draw conclusions adverse to Cowles under the mail fraud issue.

103. This said, we cannot agree with the full implications of the Judge's ultimate conclusion under this issue (I.D., para. 186), which is open to the interpretation that, in every case, a licensee's good broadcast record immunizes it against the effect of misconduct in the non-broadcast activities of the parent or of related corporations, so long as the licensee is not tainted by participation therein or has no knowledge thereof.³⁰ While it may be the Judge did not intend a conclusion of such sweeping implications, we consider it necessary to dispel the possibility of his statement being misinterpreted. Certainly some point is reached where, no matter how superlative a

³⁰Obviously, under this reading, it would be in the best interest of a multi-operation corporation to so structure its broadcast subsidiary as to give it total "deniability" of misconduct elsewhere in the organization.

licensee's broadcast record and no matter how guiltless the licensee itself may be, the non-broadcast activities of a related corporation reach such a level of criminality that they cannot effectively immunize the licensee. We make no attempt here to say where the dividing line should be drawn and we are not faced with such a case here. Our purpose is only to serve notice that our affirmance of the Judge does not render unlawful conduct of an applicant in non-broadcast activities irrelevant under the policy statement noted in the preceding paragraph. Moreover, it should be perfectly obvious that if a corporation with both broadcast and non-broadcast activities runs afoul of the law in conducting its non-broadcast affairs, it exposes itself to questions concerning its fitness to remain a licensee. We make this point because Cowles complains elsewhere that it was forced into a long and costly hearing which should never have taken place. The short answer to this is that to the extent CCI's non-broadcast activities raised substantial and material questions bearing on Cowles' fitness to have its license renewed, CCI bears the responsibility for having brought about conditions which unavoidably dictated a hearing.

104. The final consideration remaining under the mail fraud issue is the Martinelli incident. The incident is regrettable. Because the matter first came to our attention in Central's reply pleadings, Bureau counsel was questioned about the Martinelli incident at oral argument before the Commission. We are satisfied that any testimony Martinelli had to offer as a PDS dealer would have been cumulative to that of the three PDS dealers who testified in this proceeding. We think it is further apparent Martinelli tried to "sell" his testimony to Central's counsel for a price, and that once his purpose was exposed on the record by the memorandum of Central's counsel, Martinelli (claiming an urgent financial engagement) returned to Pittsburgh and

thereafter made himself unavailable. (Tr. 4723 to 4726.) In our opinion, the Martinelli incident does not require a remand of this proceeding. Central's counsel stated at oral argument (Tr. 4740) he did not seek a remand, and agreed that his comments went more to the manner in which the incident had been handled than to the precise effect of the evidence on this case. (Tr. 4741.) Accordingly, we see no need for a remand, nor (assuming the statute of limitations has not run) do we think any useful purpose would be served by referring this matter to the Department of Justice.

Comparative Consideration of the Applicants

105. Central agrees the Judge correctly concluded the advantage lay with Central on the diversification issue because it has no other mass media interest, in contrast to Cowles' associated mass media interests (Para. 49, *supra*). Central then contends that in *Associated Press v. United States, supra*, the Supreme Court set maximum diffusion of the ownership of communications facilities as a clear First Amendment objective. It notes our 1965 *Policy Statement on Comparative Broadcast Hearings* and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1971) stress this same objective. Central then argues that under these authorities, diversification is a matter of primary significance and may well be the single most important criterion in choosing between applicants. Accordingly, Central contends, it must receive a "clear and compelling preference" on the diversification factor.

106. Central next takes issue with the Judge's conclusion that Central's diversification advantage need not be compelling unless its ability to render the best practicable service equalled or exceeded Cowles' ability. Central views this conclusion as constitutionally dubious, presumably (although Central does not say so explicitly) in view of the Supreme Court cases cited above. Central then contends its diversification showing is so conclusive it

should receive a preference of decisional significance. But assuming *arguendo* the showing is "not compelling," Central says it should be preferred under the best practicable service criterion solely because (given the main studio move) "it will return the operation of Channel 2 to . . . Daytona Beach."

107. Central then turns to integration of management and ownership, arguing Cowles presents the classic case of absentee ownership with none of CCI's or Cowles' owners residing in the WESH-TV service area. It contends no person active in day-to-day management is an owner of Cowles, and only well after Cowles' license was challenged were any of the station's key personnel elected as officers and/or directors of Cowles. In contrast, Central argues its proposed integration is qualitative, specific and carefully conceptualized. Central admits its management integration proposals are "perhaps modest under some standards," but it argues that compared with Cowles' total lack of integration, Central's proposal is decisionally significant. Central then lists the various owners and officers who will be integrated into management and the extent of their participation, and notes all of these persons except one are local residents and are dedicated to community affairs.

108. Central next cites *Mid-Florida Television Corporation*, 33 FCC 2d 1, a 1972 Review Board decision which held that black ownership is decisionally significant when reflected in active participation in station affairs. (The comparative proceeding involved in *Mid-Florida* was later reviewed *sub nom. TV 9, Inc. v. F.C.C., infra.*) Along these same lines, Central contends the Judge's conclusion that neither Mrs. Goddard nor Central had made any effort to determine the workability of any particular programming concept (I.D., para. 146) erroneously interjects programming into this proceeding, contrary to our decision in *Moline Television Corporation*, 31 FCC 2d 273.³¹

³¹Central states that in the Designation Order, we found that Central's ascertainment survey and programming proposals were superior. Suffice it to say we made no such finding.

109. Central then attacks the conclusion that its proposal to substitute a mobile van for permanent studios in Orlando gives no promise to render service comparable to that available from Cowles' Winter Park studios, making such studios a "definite plus" for Cowles under best practicable service. Central believes this conclusion irrationally faults it for not proposing superior facilities in Orlando (where the station does not belong) and for proposing to return Channel 2 to city of license.

110. In its summarizing conclusions, Central reasserts its alleged comparative superiority under "*every single comparative criterion*" (Central's emphasis) and points to Cowles' weaknesses: mail fraud, the studio move, and CCI's mass media interests. All this is said to require reversal of the Judge. Claiming that diversification reaches a "Constitutional imperative" under the *Associated Press* case, *supra*, and referring to the limited licensing scheme, Central argues industry stability—relied on by the Judge—is not so important that a scarce resource should be retained by those whose concern for profit outweighed their fiduciary obligation. Concluding its arguments, Central says that if the Initial Decision is sustained, "industry stability" will be decisionally equated with "closed fraternity," in derogation of constitutional, judicial and statutory imperatives.

111. Not surprisingly, Cowles agrees with the Judge's selection of it as the best qualified applicant, and its arguments respecting comparative consideration are brief. Cowles argued before the Judge that a renewal applicant should be adjudged solely on its past record.³² Only under

³²The Judge agreed, citing our letter in *Wedsco, Inc.*, 41 FCC 2d 251 (1973). See I.D. para. 191 Central has excepted to this conclusion. While the Judge's position was correct at the time the I.D. was released, the Commission later changed its position respecting the exclusive weight to be given a renewal applicant's past broadcast record in comparative proceedings. Accordingly, para. 191 of the I.D. is corrected to reflect our decision in *Belo Broadcasting Corporation*, 47 FCC 2d 540 (1974) which makes it clear that although we accord primary weight to a renewal applicant's past broadcast record, other comparative criteria under the 1955 Policy Statement will also be considered in comparing a renewal applicant and a new applicant.

protest did it make a full media interest showing. It argues this media showing is irrelevant because CCI's media interests are distant from Daytona Beach and the WESH-TV service, are well served by competing media voices, and that to give it a comparative demerit because of CCI's mass media interests would arbitrarily restructure the broadcast industry on an *ad hoc* basis. Cowles then notes that after making its media showing, the Judge refused to permit Cowles to update its media information to reflect certain voting trust agreements involving the Des Moines Register & Tribune's stock ownership in CCI, and Gardner Cowles' stock ownership in Des Moines Register. The Judge based his ruling on the ground that an updating of Cowles' media showing might improve its comparative position. Cowles argues this was wrong, and the Initial Decision now reflects a non-existent state of facts.

112. Cowles next argues the only basis for the required media showing was a dictum in Footnote 36 of the *Citizens Communications Center* case, *supra*. Cowles notes that in Footnote 35 of that case, the Court said factors which might be relevant—at least to an applicant's claim of a superior past record—were the extent to which station profits had been reinvested, and whether the licensee's presentation of news and public affairs programs compared favorably with similarly situated stations. Cowles prepared exhibits describing its investments and improvement of WESH-TV, and a comparison of WESH-TV's news and public affairs programs with that of other stations in Daytona Beach Orlando and Miami. The latter exhibit was rejected on the ground the issues did not call for such a comparison, and the reinvestment exhibit was rejected on the basis of Central's objections. Cowles argues it is unfair to accept evidence under one criterion of *Citizens*, while rejecting it under another.

113. The Judge's conclusions have already been fully digested and will be repeated here only insofar as necessary to provide the background for our rulings. Central is entitled to a preference under the diversification criterion. Its advantage here is clear, given its total lack of any other mass media interests as contrasted with the mass media with which Cowles is associated. While the significance of this preference is reduced—as the Judge noted—by the fact CCI's other broadcast and newspaper interests are remote from Daytona Beach and are not shown to dominate their markets, the fact remains Central is to be preferred under this criterion.

114. For the most part, we find no merit to Cowles' arguments under this criterion. The Judge did not err in requiring Cowles to make a full media showing. See footnote 36 of the *Citizens Communications Center* case, *supra* and paras. 125-129 of the *Second Report and Order in Docket 18110*, 50 FCC 2d 1046, at 1087-88, where we interpreted the impact of that case on comparative proceedings involving a renewal applicant. As for Cowles' reinvestment of profits in WESH-TV, it appears from its earlier arguments that the basic purpose of such improvements was to achieve competitive equality with the Orlando stations. In any event to the extent such reinvestment might bear on diversification (as claimed by Cowles) it would not alter the basic conclusion that Central has the clear advantage under the diversification criterion.³³

³³In compliance with Section 1.65 of the Rules, Cowles has recently informed us CCI disposed of its AM and FM stations in Des Moines, and that CCI no longer owns the licenses of an AM and FM station in Memphis. We note the tender of that information, but attach no decisional significance to these post-decision changes. Moreover, Finding No. 123 is corrected to reflect the fact that the assignment application referred to in that finding had already been granted (October 17, 1978) at the time the Initial Decision was released.

Finally, the Judge did not err in refusing to permit Cowles to update its media showing to reflect the two voting trusts. Obviously, the changes involved would have improved Cowles' comparative position. We consider below, in the discussion of Cowles' showing under the best practicable service criterion, why we believe the Judge erred in excluding certain exhibits bearing on Cowles' past broadcast record.

115. We consider next the conclusion that Central's diversification advantage need not be compelling unless Central could show its ability to render the best practicable service exceeded or equalled that of Cowles. The Judge considered this especially pertinent in the present context, where renewal of Cowles' license would not increase existing levels of concentration which we knew of in approving Cowles' acquisition of WESH-TV and in later renewing the WESH-TV license. The Judge further observed we had not heretofore used the diversification criterion to restructure the broadcast industry to achieve maximum diversification of mass media ownership, and the need for industry stability had its own decisional bearing here. We believe this conclusion fully squares with current Commission policy and the Court of Appeals' decision in *Fidelity Television, supra*. Even in the more compelling situation involving common ownership of a daily newspaper and broadcast stations in the same market, we have determined that, except in a limited number of egregious cases, we will not require divestiture to break up existing concentrations. As we said in Para. 109 of the *Second Report and Order in Docket 18110*, "In our view, stability and continuity of ownership do serve important public purposes." Moreover, in Para. 129 of that same *Report, supra*, we stated;

... In connection with both any policy that may be developed and with comparative renewal proceedings that may occur before the development of such policy, we do not believe the Court in *Citizens Communications Center* is seeking to have ownership patterns of the broadcast industry restructured through the renewal process; that, rather, any *overall* restructuring should be done in a rulemaking proceeding. And what we consider to be the necessary *overall* restructuring has been done today [i.e., the new rules adopted in Docket 18110].

116. Central's argument that it must receive a "clear and compelling" preference for diversification is without precedential support, if Central means its superiority under diversification is *per se* decisive and renders everything else irrelevant. Central's claim that the Judge's conclusion respecting the less than decisive nature of Central's diversification preference is of dubious constitutionality, is not supported by any citation, although elsewhere in its brief, Central argues that diversification "assumes dimensions approaching a Constitutional imperative under *Associated Press* or other authorities cited by Central says that the public interest in promoting First Amendment objectives through expanding the competing sources of opinion is to be achieved through according decisive weight to an applicant whose proposals would diversify mass media ownership. Even Central is compelled to sound a less positive note in its later arguments (see below) which assume this factor may not be decisive after all.³⁴

³⁴Central argues the effect of the *TV 9, Inc.* decision in connection with its discussion of the best practicable service criterion, apparently because the Judge considered the proposed participation station affairs by two black stockholders under this criterion. Central has also asked us to take official notice of the decision in *Leroy Garrett, trading as Garrett Broadcasting Service (WEUP), F.C.C.*, — U.S. App. D.C., — 513 F. 2d 1056 (1975), clarifying the *TV 9* decision. We do so below is discussing the effect of the *TV 9* and *Garrett* decision on both the best practicable service and diversification criteria.

117. We consider next the Judge's comparison of the applicants under the best practicable service factor. The thrust of his conclusion is that he considered Central's integration of management and ownership proposals "very weak," with little promise that Central's owners would play a significant role in station affairs. (I.D., paras. 196-201.) In contrast, he found Cowles' past record "thoroughly acceptable" and likely to remain so. The "only blot" on the stations' record was the unauthorized studio move. Although the studio move justified a "comparative demerit," it did not justify a conclusion Cowles was unlikely to continue to provide proper service to Daytona Beach. And although Cowles had to restore the Winter Park facilities to their auxiliary status, these facilities were superior to Central's proposal to use a mobile van to service Orlando and warranted a "definite plus" for Cowles. Finally, making his decisive comparison, Judge Naumowicz concluded Cowles' "distinctive preference" for the best practicable service outweighed Central's preference under diversification. And absent any showing that the concentration which existed when we permitted Cowles to acquire WESH-TV had actually disserved the public interest, the more compelling objective was to select the applicant most likely to provide the best practicable service to the public—namely, Cowles.

118. We are in essential agreement with these conclusions, which on the record as a whole are supported by the weight of the evidence. Except as modified below, those conclusions are affirmed. As explained in greater detail below, we believe such modifications are in order because Judge Naumowicz made no conclusions of the kind dictated by the *TV 9* decision, and because in our judgement he did not give adequate credit to certain aspects of Cowles' operations and broadcast record.

119. Turning to Central's argument, Central cites no precedent for its argument that assuming its diversification advantage is not *per se* compelling, it should be preferred for the best practicable service solely because it will return Channel 2 to Daytona Beach. The fallacy of this argument is that Channel 2 never left that city. As the Judge noted, it remains assigned to Daytona Beach until reassigned under *de jure* rulemaking, and the conclusion that the main studio was gradually moved to Winter Park by Cowles is not tantamount to concluding Channel 2 was moved to Orlando.

120. Admittedly, Central's showing on integration of management and ownership is somewhat stronger than that of Cowles. This would appear to be inevitable because Cowles is 100% owned by CCI, which is not involved in day-to-day management of the station, but rather operates WESH-TV through locally-resident managerial personnel. But the question here is whether any preference to which Central is entitled under this criterion must, as Central contends, be accorded decisionally significant weight. While Central does not explain what it means by "decisionally significant weight," it appears to attach to its integration proposals the same "compelling" quality which it argues for under-diversification. Assuming we correctly read this premise, we are unable to agree.

121. As the Judge correctly noted in assessing this criterion, *full-time* participation of owners in station operations on a permanent basis is of substantial importance. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. Little weight attaches to part-time participation primarily on a consultancy basis. *Ibid.* It is fully apparent from the findings and conclusions that Central does not propose that degree of integration which we consider meaningful under the *Policy Statement*, both because of the minor degree of full-time participation and

the relative impermanence thereof. Stated, the General Manager will serve only in the "formative stages" of the operation, and Mrs. Goddard will serve only until the station is "thoroughly organized and stabilized."³⁵ Moreover, the limited integration proposed by Central assumes added significance in light of the complete lack of broadcast experience on the part of Central's principals. Even Central is forced to admit its integration proposal "is perhaps modest under some standards." In our judgment, according Central the decisive preference under integration which it urges on us would seriously erode an important criterion used in comparative hearings. This would be thoroughly unjustified because after all, when it puts its proposals together, it was entirely within Central's power to decide what roles (and the permanence thereof) its stockholders would play. Having opted for considerably less than meaningful full-time integration, Central is in no position to complain.

122. One remaining aspect of Central's integration proposal is the proposed participation of two black stockholders (Dr. George P. Schanck and Mr. George W. Engram) in station affairs, and the effect of the *TV 9, Inc.*

³⁵Central's claim that the Judge erroneously interjected program proposals into the hearing by finding Mrs. Goddard had no broadcast or programming experience, and neither she nor Central had made any effort to determine the workability of any particular programming content is without merit. *Moline Television Corporation*, 31 FCC 2d 263, 273, is not in point because it does not involve a renewal/new applicant comparison, but rather, a promise vs. performance issue against a licensee involving representations made in earlier initial licensing. We agree with Cowles that in the context here, it is difficult to see how we can conclude a new applicant proposes a better practicable service than the existing licensee without detailing how the new applicant proposes to improve on programming. This unavoidably necessitates some degree of comparison.

decision on this proceeding.³⁶ It is not necessary to analyze the Court's original *TV 9* decision at length, because we think the definitive decision is set out in the Court's Supplemental Opinion denying our petition for rehearing *en banc*. *TV 9, Inc. v. F.C.C.*, 161 U.S. App. D.C. 345 F.2d 929, *cert denied*, 419 U.S. 986, 29 RR 2d 963 (1974). Moreover, the *TV 9* decision was explained by the Court itself in its recent *Garrett* decision, *supra*. There, the Court noted that in the Orlando proceeding, it had addressed itself to a situation where the Commission had refused to accord merit to a contestant for a television channel by reason of the inclusion of two black stockholders in its venture. The Court said that in rejecting the Review Board's and Commission's approach to black ownership (footnote *supra*), it had stated in *TV 9*:

[M]inority stock ownership of an applicant serving [a] community is a consideration relevant to a choice among applicants of broader community representation and practicable service to the public. The credit awarded due to . . . participation, as part owner, in management is not the same as credit based on broader community representation attributed to [black] ownership and participation.⁴⁶

³⁶*TV 9, Inc. v. F.C.C.*, 495 F.2d 929, 28 RR 2d 1115 (1974). This proceeding appears in the Commission's reports under the title referred to by Central — *Mid-Florida Television Corporation*, 33 FCC 2d 1, a 1972 Review Board decision. The aspect of the Board's decision which is relevant here was its conclusion that under the Commission's Policy Statement [1 FCC 2d 393], "... Black ownership cannot and should not be an independent comparative factor, as Comint would have it; rather such ownership must be shown on the record to result in some public benefit." 33 FCC 2d at 18. We subsequently affirmed the Review Board's decision, at which time Commissioner Hooks issued concurring statement, in which he disagreed with the Hearing examiner and the Review Board that they were barred from awarding a preference to an applicant proposing substantial minority owner expressed its disagreement with the Commission on the black ownership phase of the proceeding: *TV 9, Inc. v. F.C.C.*, *supra*. In its original decision, the Court drew heavily on Commissioner Hooks' concurring statement.

⁴⁶[Citation omitted.] In our supplemental opinion we explained that we had “not relied solely upon minority ownership,” but had held “only that [the applicant] was entitled to be accorded merit due to the ownership and participation of” its two black stockholders. . . . We stated further that “[w]hat consideration might be given to ownership of stock alone is not before the court. Nor need we consider whether the primary reliance is properly assigned to ownership or participation, for in this case there is a meaningful combination.” *Id.* at 361 n. 1, 495 F. 2d at 941 n. 1.

Consequently, we held “that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded, [Footnote omitted] and that “[r]easonable expectation not advance demonstration, is a basis for merit to be accorded relevant factors.” [Footnote omitted]

123. In Footnote 40 of the *Garrett* decision, the Court explained that in its supplemental *TV 9* opinion, it had distinguished between “merit” and “preference” the Court meant “. . . a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns.” On the other hand, “merit” or “favorable consideration,” the Court went on to say, “is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference. ‘Merit,’ therefore, is not a ‘preference’ but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded the preference.” Footnote 40, *Garrett* decision, *supra*.

124. Finally, after rejecting the Review Board's approach in the *Garrett* case, the Court went on to say in paragraph 5 of its decision:

...The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to needs of the black citizenry, [Footnote omitted], and that "reasonable expectation," without "advance demonstration," gives them relevance.

125. The Review Board's decision in the Orlando comparative case (which had not yet been decided by the Court) was referred to by Central *sub nom. Mid-Florida* in its proposed conclusions respecting the best practicable service criterion. (Central's proposed conclusion 153). There Central noted the Review Board had held black ownership is decisionally significant when reflected in active participation in station affairs, and it pointed to the proposed participation of Messrs. Schanck and Engram. Although the Judge made findings (para. 150, I.D.) respecting ownership interests and proposed participation of these two stockholders, the effect of the Review Board's decision—which we had affirmed—was not discussed by the Judge, presumably because the Court's original decision in *TV 9, Inc.* was released only three weeks before the present Initial Decision was issued.

126. The effect of *TV 9, Inc.* was pressed on us at oral argument, because Central's counsel felt the matter had not been adequately dealt with in the Initial Decision. However, he felt it was not necessary to remand this proceeding to the Judge, because the present record was entirely adequate to permit the Commission at this point to consider the impact of that decision. (Tr. 4742-43). We agree with Central on both points. Moreover, we agree with Central that we must take the *Garrett* decision into account here.

127. The findings accurately reflect the fact that Dr. Schanck is a vice-president, director and 3.5% stockholder in Central (i.d., para 141), and that Mr. Engram is a 1.7% stockholder (but holds no official position in Central). (I.D., para. 150). But as Central correctly notes in its exceptions, the Judge failed to find that Messrs. Schanck and Engram (and other Central part-time participants) are community leaders and/or active in community affairs. The testimony of Dr. Schanck (Tr. 1229-54) and of Mr. Engram (Tr. 2445-56) and their biographical statements³⁷ amply support a finding that these gentlemen have long been, and still are, actively engaged in community affairs within the WESH-TV service area, and we so find. We further find that both Messrs. Schanck and Engram have an awareness of minority group problems within the Daytona Beach-Orlando area, and have contributed to alleviating such problems. This is particularly so with Dr. Schanck, whose personal investment in housing for lower-income groups brings a minimal financial return.

128. The Judge's conclusions further accurately reflect the fact Mr. Engram will devote about 10% of his time to station affairs as an advisor on affairs of the black citizens of the areas, and that Dr. Schanck will devote 40% of his time to station affairs as an advisor on affairs of the black citizens of the area, and that Dr. Schanck will devote 40% of his time advising the station on public affairs programs

³⁷Some confusion was expressed at oral argument over whether the Judge had excluded biographical data on Messrs. Schanck, Engram and other small stockholders. He did not. The biographical sketch on Dr. Schanck (Central's Exhibit No. 10) was received in evidence at Tr. 1229. Engram's biographical statement (Central's Exhibit 12) was received in evidence at Tr. 2445. Those biographical statements served as the basis for lengthy proposed findings on Messrs. Engram and Schanck (Central's proposed finding Nos. 190-196, and 209-219, respectively), which were for the most part adopted by the Judge.

and the selection of participants for such programs. In the case of Dr. Schanck, we further conclude that the public affairs programs he is particularly concerned with are those dealing with medical care for the underprivileged, race relations, and the like. We think the record as a whole supports such a conclusion. See Tr. 1249.

129. We now evaluate these findings and additional conclusions in light of the *TV 9* and *Garrett* decisions. It is apparent the black entrepreneurship proposed by Central would tend to promote broader community representation and practicable service to the public by increasing diversity of program content, especially that of opinion and viewpoint. Thus, to use the language of the *TV 9* decision, the diversity which would be promoted by Central's proposed black ownership is definitely in Central's favor, and we conclude Central is entitled to merit for its proposals. But at the same time, we do not think this additional merit, even when considered in conjunction with the slight preference which Central is entitled to for integration and management and ownership, is sufficiently substantial to outweigh the plus-factors in Cowles' favor under the best practicable service criterion.³⁸ The combined ownership of Messrs. Schanck and Engram (5.2%) is relatively small, compared to the combined 14% black ownership in *TV 9*. And while their potential for contributing to program diversity is not necessarily limited by the size of their stock holdings, their proposed part-time participation (and especially the 10% proposed by Engram) suggests that any merit stemming from their participation is diminished. Even in the case of Dr. Schanck, who proposes

³⁸Of course, to the extent black ownership imparts additional merit to our policy goal to diversify the ownership and control of mass communications media, Central's clear advantage under the diversification criterion is increased. But additional enhancement of its diversification preference does not make that preference "compelling" (to use Central's words), for reasons already discussed above.

to devote 40% of his time, it appears his participation would be limited more to selecting participants for public affairs programs rather than directly advising on such programs.³⁹ In view of all this, we cannot agree with Central that the ownership interests and participation of Messrs. Schanck and Engram require a preference under the best practicable service standard.

130. Further, in assessing the qualify of Central's integration proposals, we think that our decision in the *RKO General* case (28 RR 2d 1501 (1973), *aff'd sub nom. Fidelity Television, Inc. v. FCC, supra*), which was released shortly before the I.D. in this case, has special pertinence here. In many ways, the instant case and the *RKO* case are remarkably similar. Both involve challenges to an existing licensee by a newcomer in a comparative renewal proceeding; both involve charges of wrongdoing by related corporations associated in ownership with the licensee, and both involve licensees owned by absentee multiple owners who have delegated the responsibility for day-to-day station operations to locally resident management teams. In the *RKO* case, we noted that the challenger had a quantitative edge over *RKO* under the integration criterion. In fact, the showing was much stronger in *RKO*, where stockholders owning almost 23% of Fidelity's stock would be integrated on a full-time basis, in contrast to the single 3.5% stockholder here with full-time integration. (I.D. para. 199). But in *RKO*, we noted that the challenger's quantitative superiority for integration was partially offset by the autonomy which *RKO* accorded its local station staff

³⁹Compare his testimony on cross-examination which suggests a broad, undefined approach to his role (Tr. 1249) with his earlier admission that he would not be advising Central on medical problems of the underprivileged because "that would come under programming" and that he would not be advising on health problems caused by pollution (for reasons never explained). (Tr. 1239).

to use their familiarity with area needs in developing appropriate programming. That same observation applies here.

131. As noted earlier, this case was tried under the earlier ruling when we said that the renewal applicant's past record was the sole basis for projecting probable future performance. See I.D., par. 191. For this reason, the Judge made no conclusions respecting Cowles' integration proposals, even though Cowles had included contingent conclusions on this point in its proposed findings and conclusions. Those proposed conclusions (Nos. 137-150), which are fully supported by substantial evidence in the record, show that WESH-TV is operated by a substantially autonomous local management team. Two of Cowles' three directors reside in the areas where the station maintains facilities. John Haberman, Cowles' president, general manager and director (who is also an officer of CCI) resides in the Orlando area and has long been active in local civic affairs. Walter Strouse, Cowles' executive vice-president, a director, and station manager of WESH-TV, has been with the station since 1956 and resides in Daytona Beach. He, too, has long been active in civic affairs. Two other officers, John Hitchcock (assistant station manager) and Nicholas Pfeifauf (director of community affairs for WESH-TV) reside respectively at Winter Park and Holly Hill, and both are involved in local community affairs.⁴⁰

⁴⁰Cowles' third director, Gardner Cowles, is chairman of Cowles' board of directors. He visits the station for about one day every three months. Cowles' secretary (John Harding, since deceased), also served as CCI's General Counsel. Marvin Whatmore, Cowles' treasurer, is also president of CCI. Mr. Whatmore is not an area resident, but he does have a long record of experience in broadcasting, as does Gardner Cowles.

132. The conclusions herein are modified to reflect the foregoing information. In our judgment, the record fully establishes the autonomy which the parent corporation accords the local management team of WESH-TV. Moreover, the active participation of resident officers in civic affairs within the Daytona Beach-Orlando area lends assurance there is and will be continuing sensitivity to area needs and interests, a conclusion further buttressed by the continuing ascertainment procedures which Cowles has had in effect since 1968. (Cowles' proposed conclusion 104).

133. In view of the foregoing, the Judge did not err in refusing to grant Central a preference under the integration criterion. We recognize that certain aspects of Central's integration proposals warrant a "merit," to use the language of the Supplemental Opinion in *TV 9*, but we do not think that merit is sufficiently substantial to justify a preference. Again, we return to a point we made above: Central was responsible for the structure of its organization, the degree of integration of management it proposed, and the specific type of service it proposed. And if its proposals prove insubstantial, the fault lies with Central. Accordingly, we conclude that the integration proposals of both applicants are substantially similar, and neither is entitled to a preference for such proposals, though Central's warrants a "merit."

134. We turn now to the plus factors which the Judge accorded Cowles under the best practicable service criterion: Cowles' "thoroughly acceptable" past record of broadcast service and the "definite plus" attaching to its auxiliary Winter Park facilities. The only blot on Cowles' record is the studio move, which was sufficient to warrant a comparative demerit, but insufficient to justify a conclusion Cowles would be unlikely to continue to provide proper service to the community. This combination of pluses gave

Cowles a distinctive preference under the best practicable service standard, which outweighed Central's preference under diversification. Moreover, in the absence of any showing that the concentration which came about when we permitted Cowles to acquire WESH-TV from Telrad had disserved the public interest, the more compelling public interest objective was in selecting the applicant most likely to provide the best service.

135. We agree with the conclusion that Cowles is entitled to a "distinct preference" for the best practicable service. But in two respects, we cannot agree with the Judge's conclusions under this criterion.

136. Initially, we do not believe that in the circumstances, Cowles should get a "definite plus" for the superiority of its Winter Park auxiliary studios, as compared to the mobile van service which Central proposes to meet viewer needs in the Orlando area. We can appreciate the technical and physical superiority of permanent auxiliary studios over a mobile van service. But in view of the *de facto* move of the main studio to Orlando which the Judge found had occurred, it is fair to assume that, in considerable measure, the physical superiority of Cowles' Winter Park facilities stemmed from circumstances which in the Judge's view warranted a comparative demerit against Cowles. Given this, the award of a definite plus to Cowles under the best practicable service criterion was improper, and the Judge's conclusion on this point is overruled.

137. Our other area of disagreement with the Judge involves Cowles' past record as "thoroughly acceptable," and we do not adopt it. The term is too vague to be meaningful, as evidence by the diametrically opposite positions which the applicants again take respecting the

conclusions. As much as Central can muster against Cowles' record is the argumentative charge that the record is "*thoroughly unacceptable*" (Central's emphasis) because the studio move issue shows that Cowles abandoned its city of license. On the other hand, Cowles argues WESH-TV's record is superior, justifying a "plus of major significance" under *Citizens Communications Center v. FCC*, *supra*.

138. Since this is a comparative hearing involving a regular renewal applicant and a newcomer, it comes within the *Citizens Communications* case, *supra*. The standards defining "superior" service have not yet been formulated and in any event would not apply to this proceeding in view of what we said in para. 10 of the *Notice of Inquiry in Docket 1915 4*, 27 FCC 2d 580 (1971), in which Docket such standards are being considered. Accordingly, this proceeding should be decided on the record compiled at the hearing (*Moline Television Corp.*, 31 FCC 2d 263, 268 (1979)), at the same time giving primary, although not exclusive, weight to Cowles' past broadcast record. See *Belo Broadcasting Corporation*, *supra*.

139. In the *Citizens Communications* case, the Court noted that a most important factor in a renewal proceeding is an incumbent's past record. It went on to note that:

... Insubstantial past performance should preclude renewal of a license. The licensee, having been given a chance and having failed, should be through ... At the same time, *superior* performance should be a plus of major significance in renewal proceeding. (145 U.S. App. D.C. 44, 447 F.2d 1213, emphasis in original)

Further, in Footnote 35 of the case, the Court said it recognized that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.⁴¹ It is against this background that we consider Cowles' past record.

⁴¹In the earlier *WHDH* case, the Court referred to a renewal applicant's "... legitimate renewal expectancies implicit in the structure of the [Communications] Act. 143 U.S. App. D.C. 383, 444 F.2d. 841 (1970)

140. We have already indicated our disagreement with the term "thoroughly acceptable" used to describe Cowles' past record. In our judgment, that term does not adequately reflect the outstanding quality of Cowles' past performance. We have examined the record with particular care and we believe that record fully warrants a conclusion that Cowles' past performance has been superior, meriting a plus of major significance. We turn now to the reasons which in our judgment compel this conclusion.

141. A key factor in the appraisal of a renewal applicant's past performance is the station's community involvement, a point we stressed both in the initial *Notice of Inquiry in Docket 19154* and in *Moline Television Corp., supra*. Judge Naumowicz made detailed findings on the local program series which WESH-TV presented during the license period in question (I.D., paras. 124-138), and it is unnecessary to repeat those findings here. Suffice it to say we agree completely with the Judge that these findings support the subsequent conclusion (I.D., para. 202) that Cowles had "... evolved and presented a substantial number of programs and program series designed to serve the needs and interest of the community."

142. But we do not think the findings adequately portray the full extent of Cowles' community involvement, and we accordingly refer to other parts of the record—not specifically adverted to by the Judge—which reinforce our conclusion that WESH-TV has been solidly involved in the community life of the Daytona Beach-Orlando area. For example, Cowles has been sensitive to the needs of the Black-American community, as shown by its particular efforts to provide programming on behalf of Bethune-Cookman College, a Daytona Beach Black-American liberal arts college. As Cowles points out, it presented the college choir and the President's Christmas

message, publicized musical events at the school, and presented 21 *Minute Memos* on behalf of the United Negro College Fund Drive and Bethune-Cookman during 1969. Further, in 1969, Cowles expanded its college scholarship program to include Bethune-Cookman College, thus making available a \$1,500 annual scholarship to a deserving Black student at Bethune-Cookman. (Cowles Exhibit 109). As further evidence of WESH-TV's community involvement, we take note of the *Topic* program, a regularly scheduled weekly half-hour public affairs program which was broadcast 141 times during the license period. (I.D. para. 125). The detailed proposed findings—which are supported by substantial evidence—respecting this program show that through the *Topic* series, WESH-TV has informed the community on a variety of critical problems of interest to area viewers, such as urban renewal, drug abuse, alcoholism, crime, beach erosion, education, etc. This program series and the station's other local news and public affairs programs have quite obviously contributed substantially to an informed electorate, an important goal of the inquiry in Docket 19154. Moreover, it is apparent the format of many of the programs discussed in the findings is such as to permit and encourage participation by local community leaders. Further contributions to an informed electorate have come through WESH-TV's regularly scheduled editorials. And when such editorials have involved controversial issues of community interest, WESH-TV has offered an opportunity for response to the station's editorial views.

143. Other evidence of Cowles' solid commitment to community life is contained in statistics for the composite week of 1970. For that composite week, 34% of WESH-TV's news programs were devoted to local and regional news. (I.D., para. 131). With reference to that composite week, we additionally find that 11.36% of the station's total

programming was devoted to news, and 4.47% to public affairs. Additionally, 12.75% (16 hours and 37 minutes) of total programming was devoted to local programs, of which 3 hours and 4 minutes were broadcast between 6 and 11 p.m.

144. Another important index in judging a renewal applicant's past performance is the locality's estimate of the applicant's service, *Moline Television Corporation, supra*. On this point, Cowles' record is definitely outstanding. As noted by Judge Naumowicz (I.D., paras. 139, 202), a number of local residents and community leaders presented opinion evidence respecting WESH-TV's service to the community, and the consensus of their testimony was that the station had been cooperative and sensitive to the needs of the witnesses' constituencies. Moreover—and we consider this crucial—no contrary opinions were offered. The Judge's findings and conclusions on this point have solid support in the record evidence.

145. For the record, we set out some examples of the testimony by the public witnesses,⁴² because the findings do not do full justice to the excellent quality of cooperation between WESH-TV and local community leaders. *Mrs. Thelma Schlossberg*, active in Service for the Blind, stated in her affidavit that WESH-TV had produced a documentary explaining the work of her organization and had assisted in the annual recruitment drive for volunteers to transcribe the printed word into Braille. She stated the station had been an inspiration to her work, cooperative and helpful. *Carroll Atkinson*, a professor at Bethune-Cookman College and father and manager of the "Three Young Atkinsons," stated the station had been cooperative and sensitive to the need for developing local talent. *William F. Monfort*, District Director of the

⁴²By written affidavit, Cowles offered the testimony of 56 public witnesses, which were received in evidence by the Judge. In addition to their affidavits, a number of these witnesses testified orally.

Muscular Dystrophy Associations of America, said the station had always given excellent support to his group and he believed that in connection with the Jerry Lewis Labor Day Telethon, WESH-TV's use of its dual studios on behalf of the MDA drive involved "exciting professionalism." *Tony Mateka*, active in the Civitan Club; *Thomas Brownlee*, Executive Vice President of the Orlando area Chamber of COMmerce; *Dr. Phillip Flechaus*, a Daytona Beach surgeon who is active in several community organizations; and *Rogers P. Fair*, Chaplain of Bethune-Cookman College, offered similar testimony of the excellent cooperation their groups had received from WESH-TV.

146. We are further impressed by the testimony of several local government figures, which in our judgment further confirms the outstanding service which WESH-TV has offered the community. *Mayor Richard Kane* of Daytona Beach testified orally. He appeared on WESH-TV a number of times, both in connection with his campaign for office and as mayor. Mayor Kane cited two instances in which WESH-TV had been particularly sensitive to public needs. At one time, a garbage strike had created a health crisis in Daytona Beach and a public appeal was made over WESH-TV to have local residents place their garbage at the curb to assist inexperienced garbage collectors. (Tr. 1658-59). Neither of the Orlando TV stations carried the Mayor's personal appeal. (Tr. 1666) At another time, when Daytona Beach was having racial trouble, Mayor Kane went to WESH-TV about 11 p.m. during one such disturbance and gave a conciliatory message, which he considered "very helpful . . . because we were able to get out to the public what the real situation was on the racial crisis." (Tr. 1659-60). Neither of the Orlando TV stations carried Mayor Kane's appearances during the racial disturbances. (Tr. 1666). *Carl T. Langford*, Mayor of Orlando, has appeared

frequently on WESH-TV, using the Winter Park facilities. He found all three area TV stations helpful in covering local matters such as the airport expansion referendum, a new municipal justice building, the sale and purchase of city land, etc. He thought the cooperation of WESH-TV was equal to that of the other two area stations, but he did not characterize WESH-TV's operation as superior. He also testified WESH-TV had covered most of the Orlando City Council's weekly meetings, but not all. *Frederick B. Karl*, a State senator, one-time gubernatorial candidate, and former City Attorney of Daytona Beach, made a number of appearances over WESH-TV. He testified he used Channel 2 to generate public support for a controversial new city charter for Daytona Beach. He often made suggestions to WESH-TV respecting what he thought were newsworthy events. He was never completely rejected by the station, but, rather, was either offered time for presenting a particular news item or was assured the event would be covered either in the newscasts or on the *Topic* program.

147. Another important consideration in appraising a renewal applicant's past performance is the matter of complaints against a station. Through our continuing oversight of television stations, we know that when a station's service or operations fall below community expectations, the public is quick to let us know. Complaints might cover a variety of matters: unfair editorializing, charges of slanted news coverage, ignoring the needs of a particular segment of the viewing public, the failure to comply with the fairness doctrine, over-commercialization, rigged contests, advertiser complaints of double-billing, etc. But whatever its nature, a complaint suggests that something is wrong with the station's service operations. Here, Judge Naumowicz properly concluded that "...

significantly, the record lacks evidence of any complaints as to how the station has been run." (I.D., para. 202, emphasis supplied.)⁴³

148. Finally, there is the matter of Cowles' performance *vis-a-vis* similarly situated licensees. We agree with Cowles that the Judge should not have excluded proffered evidence of such performance, because as we pointed out in the *Moline* case (31 FCC 2d at 296), a comparison of a licensee's programming with ". . . the efforts of like stations in the market or elsewhere" is relevant in weighing an applicant's past broadcast record. Evidence involving such a comparison of records is clearly admissible under *Moline*, and objections, if any, go merely to the weight of the evidence. (here we note parenthetically that Central's objections to the excluded portions of Cowles' Exhibit 116 were based on the ground such evidence was outside the designated issues and by a reference to *The Evening Star Broadcasting Co.* case, 27 FCC 2d 316, which predates *Moline*. See Tr. 819 *et seq.* When Cowles later relied on the *Moline* case in its proposed conclusions of law, Central did not dispute the applicability of *Moline* in its reply findings).

149. The pertinent portions of Exhibit 116 (pp. 6 & 7 thereof) furnish further compelling proof of the superiority of Cowles' past performance. Exhibit 116 contains composite week data for licenses expiring in 1970. In that composite week, 11.36% of WESH-TV's total broadcast time was devoted to news programs and 4.47% to public affairs programs. In that same period, 12.75% of broadcast time was devoted to locally originated programming.

⁴³In an unopposed petition for leave to amend, Cowles informed the Commission on April 3, 1975 that two persons had filed complaints against it with the Equal Employment Opportunity Commission. In a later unopposed petition for leave to amend filed on June 16, 1975, Cowles informed us that the Miami District Director of EEOC had determined the complaints were without reasonable basis. For record purposes, these petitions for leave to amend are granted, even though—as Cowles correctly notes—they have no bearing on the issues and result in no comparative advantage or disadvantage to any party.

Comparable data from the renewal application of the CBS affiliate serving the Orlando-Daytona Beach area shows the CBS affiliate in the same period devoted 8.05% of total time to news, and 3.19% to public affairs programs. The CBS affiliate presented 7.72% of locally-originated programs. Page 7 Exhibit 116 further shows that the average percentage of total composite week program time devoted to news and public affairs programs for network affiliates in the Top 25 markets, as reflected in renewal applications filed between 1966 and 1969 is as follows: CBS—11.47%, NBC—13.05%, and ABC—8.52%. As is evident from page 6 of Exhibit 116, WESH-TV devoted a total of 15.83% of broadcast time to news and public affairs programs. In terms of locally-originated programming, network affiliate averages for the Top 25 markets are: CBS—13.8%, NBC—14.99%, and ABC—14.28%. While not exceeding these averages, WESH-TV's percentage of time devoted to locally-originated programs (12.75%) reasonably approaches the affiliate averages for the Top 25 markets.⁴⁴

150. In our judgment, the comparative data showing how Cowles has performed *vis-a-vis* other stations, both in its own market and elsewhere, is further evidence of the excellence of Cowles' past performance. In short, this comparative performance is another significant plus to be weighed in assessing WESH-TV's record.

151. In view of all the foregoing considerations, we are convinced Cowles' past performance has been superior, justifying a plus of major significance within the meaning of the *Citizens Communications* case, *supra*. That conviction is reinforced by the uncontradicted nature of the testimony in this area. Significantly, the Judge found Central had

⁴⁴Like the Judge, we decline to take official notice of statistical data in Appendix D attached to Cowles' proposed findings and conclusions. This data was never offered at the hearing, and, accordingly, Central never had an opportunity to object thereto.

offered no contrary opinions of community leaders or public witnesses suggesting that WESH-TV's service was deficient, nor did it offer any evidence of complaints against WESH-TV. As we have already noted, all that Central can muster against Cowles' past performance is the argument that its service is "thoroughly unacceptable" in light of the studio move, and the complaint the public witnesses were selected by Cowles. But invective of this kind is not evidence. Central has long known that if it wished to displace Cowles it would have to prove, *inter alia*, that Cowles' past performance was below average. Throughout this proceeding, it had every opportunity to prove this point, or at least offer some evidence that there was public dissatisfaction with the station's service. Having utterly failed to do so, the only reasonable conclusion is that no evidence exists of sub-standard performance by Cowles. On the contrary, as we have already pointed out, the evidence fully justifies a conclusion Cowles' past performance has been superior.

152. In reaching this conclusion, we are aware that a measure of subjectiveness is unavoidably involved, given the absence of standards defining "superior" service. But our conclusion is based—as pointed out earlier—on our administrative "feel" acquired through years of overseeing television operations. In our judgment, if past performance of the kind demonstrated here is not regarded as "superior," then there is a substantial danger incumbents will be tempted to lapse into mediocre performance. This would be contrary to the public interest, because as the Court recognized in footnote 35 of the *Citizens Communications* case, *supra*, ". . . the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service."

153. We come now to the final comparative evaluation of the applicants. Central has in its favor a clear preference

under the diversificatin criterion. Under the best practicable service criterion, while Central is entitled to a merit for the Black ownership it proposes, we have concluded in view of the overall weakness of Central's integration proposals that neither applicant is entitled to any preference for its integration proposals that neither applicant is entitled to any preference for its integration proposals, para. 133, *supra*. On the other hand, Cowles is entitled to a distinct preference under the best practicable service criterion in view of its past superior performance. The "only blot" on Cowles' record (to use the Judge's words) is the studio move, which justifies a comparative demerit against Cowles. But since the studio move did not result in any downgrading of service to Daytona Beach (para. 84, *supra*), this demerit does not diminish Cowles' distinct preference for the best practicable service. In view of the legitimate renewal expectancies of an incumbent, especially where the licensee's past performance has been superior, and further in view of our judgment that the license renewal process should not be used to restructure the industry, we conclude that Cowles' distinct prefrence to render the best practicable service to the public outweighs Central's clear preference under the diversification criterion.

154. We have saved for the last a charge which Central makes early in its supporting brief. Central argues that it was denied its rights under *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) because it was hampered throughout by various rulings of the Judge and the Review Board in fully developing the record. Had permissible inquiry been allowed, Central argues, there would have been further reinforcement for the findings Cowles' main studios were in Winter Park, and that CCI had created an organization "rife" with fraud. Additinally, Cowles would not have been permitted to "bootstrap" its programming disposed to manifest a "curious neutrality" toward Cowles.⁴⁵

⁴⁵Apparently this latter refrence is designed to bring this case within the orbit of *United CHurch of Christ* decision, *supra*. We have already said that that case is inapplicable here (see par. 82, *supra*).

155. We cannot agree Central was denied its *Ashbacker* rights. Undoubtedly, as Cowles and the Bureau point out, the hearing may not have been perfect in every respect and errors may well have been committed. Central's disappointment is understandable, but this does not mean it was denied a full and fair hearing. Upon consideration of the lengthy record in this proceeding, we are satisfied Central has suffered no prejudicial error under the rulings it complains of in its exceptions (see Appendix hereto). We therefore reject the argument that Central's *Ashbacker* rights were violated.

156. ACCORDINGLY, IT IS ORDERED, That the motion to correct transcript of oral argument, filed December 31, 1974, by Central FLorida Enterprises, Inc., and the motion to correct transcript of oral argument, filed January 6, 1975, by Cowles Florida Broadcasting, Inc. (WESH-TV), ARE GRANTED.

IT IS FURTHER ORDERED, That the motion to correct transcript, filed April 16, 1975, by Cowles Florida Broadcasting, Inc. (WESH-TV), IS DENIED.

IT IS FURTHER ORDERED, That the motion for declaratory relief, filed July 24, 1975, by Central Florida Enterprises, Inc., IS DENIED.

IT IS FURTHER ORDERED, That, in view of the withdrawal of the Association of Maximum Service Telecasters (AMST) from these proceedings, AMST SHALL in no way participate in any further proceedings involving the referenced applications, nor shall it make any reference to the proceedings on these applications and or any facts or circumstances involved here in any presentations by, or participation of, AMST in the inquiry instituted in Docket 20418.

IT IS FURTHER ORDERED, That the request of the Broadcast Bureau for addition of a further condition, filed December 26, 1973, IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED, That the petition for leave to amend its modification application, filed January 17, 1975, by Cowles Florida Broadcasting, Inc., (WESH-TV), IS DENIED, and the supplements to said petition for leave to amend, filed March 31, 1975 and August 8, 1975 by Cowles Florida Broadcasting, Inc. (WESH-TV) ARE DISMISSED.

IT IS FURTHER ORDERED, That the application of Cowles Florida Broadcasting, Inc. (WESH-TV) for modification of authorized facilities (File No. BPCT-4158), IS DENIED.

And, IT IS FURTHER ORDERED, That the application of Cowles Florida Broadcasting, Inc. (WESH-TV), for renewal of the license of station WESH-TV, Daytona Beach, Florida (File No. BRCT-354) IS GRANTED.⁴⁶

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

⁴⁶In view of our action herein, Central's motion for decision, filed May 12, 1976, is also dismissed as moot.

APPENDIX

Rulings on Exceptions of Central Florida Enterprises, Inc.

(A) *Exceptions to rulings of the Administrative Law Judge.*

- 1 *Denied.* The Judge correctly ruled the motion to produce was unreasonable in scope, and Central was free to resubmit its request in the event documents sought were not "obtainable by the interrogatory route." Tr. 46.
- 2-14 *Denied.* Not of decisional significance in view of our denial of the short-spacing waiver requests. Docket 13440 standards are not applicable here. See pars. 37-38 of this decision.
- 15 *Denied.* Not of decisional significance in view of our disposition of the "mail fraud" issue.
- 16-17, 20-21, 28, 33-34, 41, 53-54, 67, 73, 93 *Denied.* The license renewal period in issue was from February, 1967 to February 1970 (Tr. 553). Central's theory is that because *Immaculate Conception Church of Los Angeles v. FCC*, 320 F.2d 795, 25 RR 2128(a) prohibits a renewal applicant from upgrading his programming after the end of a license period, *all* matters outside the license period are not germane, Tr. 555. The Judge correctly ruled this case applies to efforts to update programming (Tr. 566), and indicated he would not look at programming beyond February, 1970. But *Immaculate Conception, supra*, did not bar him from considering other relevant, non-programming matters beyond that date.
- 18-19, 22-27, 29-31, 35-40, 42-49, 51-52, 55-66, 68, 75-76, 85-92, 94-96, 117, 120-121, 126-129, 134, 138-143, 152, 154 *Denied.* These exceptions involve rulings by the Judge either admitting or excluding exhibits or testimony on various grounds of materiality, relevancy, competency, or cumulativeness. As such, the rulings involve the broad discretion of

the Judge to admit or exclude evidence on grounds of materiality, relevancy, etc. In each case, the particular ruling of the Judge was reasonable and did not result in either the admission or exclusion of evidence in a manner prejudicial to Central.

32 *Denied.* The alleged superiority of Cowles' Winter Park facilities was fairly encompassed by the issues, and Central was afforded an opportunity to prove the contrary.

50 *Denied.* See par. 91, I.D., and ruling on exceptions 16-17 *et seq.*, *supra*.

69-72,74,
77-82,84,
97-98,100-
102,118,
119,122,151
83 *Denied.* Matters encompassed by these exceptions are irrelevant to the issues, and the Judge's evidentiary rulings thereon were proper.

Granted. The leading question to Brakefield was improper as a foundation question. However, it is fair to assume the substance of Brakefield's denial would have been adduced on subsequent proper questioning

99 *Denied.* Harding's participation in a profit-sharing plan did not render his testimony incompetent.

103-105 *Denied.* See par. 74 of this decision.

106 *Denied.* Central made no motion to produce but merely an inquiry as to how far procedures of *Telecable Corporation, Inc.*, 19 FCC 2d 574, would apply. See Tr. 3006.

107 *Denied.* Whether Harding had read the *Telecable* case is irrelevant.

108-113 *Denied.* The Judge correctly ruled Central's showing had to be limited to subsidiary corporations of obvious pertinence to the issues.

109-110 *Denied.* The Judge's interpretation of the *Telecable* case was not erroneous.

- 111-112 *Denied.* Central failed to pursue the opportunity afforded by the Judge to set up procedures to pursue the matter further (i.e. receipt of Central's proffered exhibits). Tr. 3069, 3074.
- 114-116 *Denied.* Of no decisional significance in view of our disposition of the "mail fraud" issue.
- 123-125 *Denied.* Questions here involve allegations going to entire PDS industry, and not CCI alone.
- 130-133,
135 *Denied.* Postal Inspector Ludtke made it clear he refused to testify on grounds of privilege, and the Judge was accordingly justified in not issuing a subpoena.
- 136-137,
144-146,
153,156-
159 *Denied.* Irrelevant, and of no decisional significance in view of preference awarded Central on the diversification factor.
- 147-149 *Denied.* U.S. Attorney Donielson was obviously one of the best qualified witnesses respecting the Government's thinking on PDS activities and the lack of any strong case against CCI. See fn. 18, I.D.
- 150 *Denied.* The Judge properly ruled the question was argumentative.
- 155 *Denied.* Alleged delay was never substantiated in Central's proposed findings, as requested (Tr. 4581) by the Judge.

(B) Central's exceptions to miscellaneous interlocutory rulings.

- 160 *Denied.* Reason for exception to par. 25 of Designation Order is not explained. In any event, see discussion and amended Designation Order in *Cowles Florida Broadcasting Inc.*, 32 FCC 2d 436.
- 161 *Denied.* The sweeping breadth of Central's motion to produce is evident on the face thereof, and the Judge correctly ruled (Order, FCC 71M-724) that he request to produce operational

documents was oppressive and burdensome. The Judge's remarks (Tr. 44-46) and his Order required Central and Cowles to meet in an effort to accommodate Central's request for relevant documents and provided for resubmission of Central's request if no accommodation could be reached.

162-169 *Denied.* The Judge did not err in his Order (FCC 71M-724) denying Central's motion for production of various documents which were described "in 55 paragraphs spread over 36 pages," on the ground the request was far too broad, would be oppressive to Cowles, and to be grantable, would require a drastic streamlining of the request. Moreover, as the Judge correctly noted, Central seems to have misconceived the scope of the "mail fraud" issue designated herein as one requiring, in effect, trial of the 50 mail fraud cases involved in the criminal information. It was never our intention that those cases be in effect relitigated before us. As noted elsewhere herein, mail fraud matters fall within the jurisdiction of other branches of the Government, and it would be unreasonable to expect the Commission to "re-try" mail fraud cases. As for the *Uniform Policy on Law Violations*, the failure of the Judge to mention this policy is cured by par. 102 of this decision.

170-171 *Denied.* It was within the Judge's discretion to rule that Central's motion requesting production of "all" correspondence between persons associated with Cowles and "other persons" respecting preparation and filing of Cowles' modification application was unreasonable in breadth and unduly burdensome.

- 172-173 *Denied.* Our own review confirms the correctness of the Judge's reasoning that allowing an appeal from the Order denying Central's motion to produce (Exceptions 162-169, *supra*) should be denied, because it was unlikely any possible restrictions on discovery would require remand.
- 174 *Denied,* for reasons stated in the ruling on Exceptions 162 to 169.
- 175-200 *Denied.* We find no error in the Review Board's Decision (32 FCC 2d 436) reformulating the mail fraud issue and denying modification of that issue as proposed by Central. Essentially, we agree with the Broadcast Bureau that the Board did its best to understand Central's rambling and often imprecise contentions respecting numerous Federal and State court proceedings, and Central's present exceptions are an effort to sharpen its earlier pleadings. In any event, these exceptions are not of decisional significance in view of our disposition of the mail fraud issue herein.
- 201-202 *Denied.* The 1965 *Policy Statement on Comparative Broadcast Hearings* has no application. See fn. 1, 1 FCC 2d 393. See also par. 129, Second Report and Order in Docket 18110, 50 FCC 2d 1046. The Judge's order denying Central the right to appeal his ruling was non-prejudicial since it permitted the adduction of *too much*, instead of too little, evidence.
- 203-204 *Denied.* The Judge accepted the Amendment with the proviso no comparative advantage would accrue to Cowles, and the subject matter of the amendment was not carried forward into the Initial Decision.

- 205-207 *Denied.* We find no error in our redesignation procedure allowing each applicant to amend its application as a matter of right, and Central fails to specify how any comparative advantage accrued to Cowles through their procedure.
- 208-215 *Denied.* The time frame governing material sought was reasonable. Moreover, par. 6 of the subject order accorded Central the right to specify the relevance of its particular time frame and to resubmit a new request specifying documents with greater precision.
- 216-220 *Denied.* The Judge did not err in ruling the proposed interrogatories went beyond the scope of the issues. An issue of the breadth encompassed by the interrogatories would not comply with the statutory requirement that hearing issues be specified with particularity.
- 220-222 *Denied.* The interlocutory ruling (see Exceptions 216-220) sought to be appealed was not fundamental, as confirmed by our own review herein.
- 223-231 *Denied.* Of no decisional significance insofar as engineering amendments are concerned in view of our disposition of the short-spacing waiver requests. As to non-engineering amendments, our Redesignation Order permitted amendments as a matter of right, a procedure fair to both applicants.
- 232-235 *Denied.* The Judge's ruling sought to be appealed did not involve possible error which might require a remand, as confirmed by our own review here, and our disposition of the mail fraud issue.

¹Central lists two exceptions numbered 220. Our ruling here relates to the first exception numbered.

- 236-240 *Denied*, for the reasons stated in our Memorandum Opinion and Order (FCC 72-443, released May 25, 1972) disposing of various petitions seeking relief from the Redesignation Order and related pleadings involving then-pending matters.
- 241-243 *Denied*. None of the submissions by Cowles required the Review Board to specify an abuse of process issue against Cowles, as requested by Central.
- 244 *Denied*. See ruling on Exceptions 201-202.
- 245-249 *Denied*. Decisionally insignificant in view of the clear preference awarded Central on the diversification factor.
- 250 *Denied*. Error, if any, was harmless, and the incidents cited were beyond the designated issues.
- 251 *Denied*. The Chief Administrative Law Judge's refusal to provide for a hearing session in Des Moines, Iowa, was reasonable in light of the circumstances and well within his discretion.
- 252 *Denied*. There is nothing unreasonable in a procedure according a potential witness a right to appeal a requirement that he testify at the hearing; the contrary would be unreasonable.
- 252-254 *Denied*. Of no decisional significance in view of the clear preference awarded Central under the diversification factor.

(C) Central's exceptions to findings of fact and conclusions of law.

- 255,256,
258,260,
263 *Denied*. Docket 13340 standards are not controlling here. See par. 45 of this decision.
- 257 *Granted*, in substance.

- 259,261, 262 *Denied*, as decisionally insignificant in view of our denial of the short-spacing waiver requests.
- 265 *Denied* as argumentative. Moreover, the relevant finding is amply supported by substantial evidence.
- 266-268, 270-273 *Denied*. Of no decisional significance in view of our disposition of the "studio move" issue. All of these exceptions are pitched in one way or another to a thesis which we have rejected, i.e., that the *de facto* move of the main studio from Holly Hill to Winter Park requires disqualification of Cowles. It does not, although it does warrant a comparative demerit.
- 269 *Granted*. The evidence warrants the proposed finding based on Brakefield's testimony. But this testimony (the sole testimony suggesting a deliberate corporate decision to concentrate on Orlando) was contradicted. See par. 84 of this decision. The Judge's conclusion on this point is thus supported by substantial evidence.
- 274,287A *Denied*. See discussion at par. 82, *supra*.
- 275-277E *Denied*. The Judge's findings are amply supported by substantial evidence adduced under the "mail fraud" issue and reflect PDS activities. These exceptions are all directed to a thesis which we reject in our decision, i.e., that the PDS activities require disqualification of Cowles.
- 278 *Denied*. The fact the listed officers own no stock in Cowles is fully evident from the opening sentence of par. 116 of the I.D. The broadcast experience of these officers is fully apparent from the record. When they were elected to office is decisionally of no significance because Cowles was awarded no preference for integration of management and ownership. See par. 118, I.D.

- 279-283 *Denied.* The programs were within the license period.
- 284-286 *Denied.* The requested additional findings would not change our judgment respecting the excellence of Cowles' past record.
- 287 *Denied.* The record amply supports the finding WESH-TV broadcast a large number of public announcements in the license period.
- 282 *Denied.* See par. 143, I.D., wherein the Judge found Staed would assume full-time duties as General Manager, *but* only in Central's formulative stages. Central has not excepted to this important time-limit on Staed's duties.
- 289-290
321 *Denied.* The findings and conclusion excepted to are amply supported by Mrs. Goddard's own testimony, which indicated her duties were ill-defined and that she would not be integrated into management permanently. See particularly Tr. 1163, 1174, 1176, 1179-81, and 1186.
- 291 *Denied.* See Chambers' own testimony to the contrary, Tr. 2543.
- 292 *Granted,* except as to Chambers.
- 293-295 *Denied.* Insofar as these exceptions contend Docket 13440 standards apply, see pars. 44-45 of this decision. Beyond this, the record amply supports the conclusion there was no significant difference between the applicants' engineering proposals sufficient to justify a preference for either applicant. As to providing new service, see Exception 296.
- 296 *Denied.* As noted in our decision, we agree with the Judge that new service afforded under the proposals and the additional considerations advanced to support a waiver (pars. 158-159, I.D.) do not justify short-spacing waivers. See pars. 4750 and fn. 14 of this decision.

- 264,297 *Denied.* Of no decisional significance in view of the conclusion Central is financially qualified.
- 298-307,
311-313 *Denied,* as not of decisional significance in view of our conclusions on the "studio move" issue. The substance of all of these exceptions is dealt with at length in pars. 82 to 85 of this decision.
- 308-309,
310 *Denied,* except as indicated in this ruling. See pars. 97-102 of this decision, setting forth our basic agreement with the Judge's disposition of the "mail fraud" issue. See par. 103 of this decision for limitations we place on the conclusion a good past broadcast record immunizes a licensee from the effect of non-broadcast activities of related corporations.
- 314 *Granted.* See fn. 32, *supra.*
Denied. The Judge's analysis of how a renewal applicant and a new applicant with no broadcast record are to be compared is correct.
- 315 *Denied.* Not of decisional significance in view of the clear preference awarded Central under the diversification criterion. See further our discussion of this aspect of the proceeding pars. 113-116 of this decision.
- 310-319 *Denied,* except as indicated in this ruling. See pars. 117-121 of this decision. Additional findings and conclusions respecting Dr. Schanck and Mr. Engram are made in this decision, and to this extent the exceptions are granted.
- 320-326 *Granted.* "Thoroughly acceptable" is too imprecise a term. See par. 137 of this decision.
- 327 *Denied.* See pars. 118 *et seq.* of this decision, noting our agreement with the ultimate weighing of comparative criteria made by the Judge. Insofar as the exceptions reargue that Cowles must be disqualified because of the "studio move"

- 328-330, 332-333 and "mail fraud" issues, see pars. 74-84, and 96-103. To the extent the exceptions reargue the diversification factor, see pars. 114-116 of this decision.
- 331 *Granted.* We agree it was improper in the circumstances to award Cowles a "definite plus" for its auxiliary studios.

Rulings on Exceptions of Cowles and CCI to portions of the Initial Decision

- 1 *Denied* as argumentative. Par. 10 of the I.D. correctly states the reduction in the existing orientation angle, but his reduction is not of the decisional significance claimed by Cowles, for reasons stated in our disposition of the short-spacing waiver requests. See par. 44-50 of this decision.
- 2 *Denied.* The present findings respecting the origin of the short-spacing between WESH-TV and WTHS-TV are adequate.
- 3 *Denied.* See pars. 45-50 of this decision.
- 4-5,7 *Denied.* The proposed additional findings are for the most part irrelevant. WESH-TV's obligation to provide service to all its service area, the existence of its auxiliary Winter Park studios and Brevard County production facilities, and the fact its present transmitter site has long been in existence are not decisive of the short-spacing waiver requests. To the extent the proposed

additional findings may be relevant, their substance is already reflected in the Initial Decision, albeit not in the words or form proposed by Cowles. See pars. 14-15, 21-22, and 62 of the Initial Decision. See also par. 48 and fn. 15 of this Decision.

- 6 *Denied.* See par. 49 of this decision
- 8 *Denied,* except as indicated hereinafter. The present decision adequately notes how FAA restrictions limit site choice. *Granted,* to the extent indicated in par. 28 of this decision.
- 9 *Denied.* The FAA has not required anything. See also fn. 9 of this decision.
- 10 *Denied.* Insofar as the proposed finding is relevant, the decisionally significant facts appear in pars. 20-22 of the Initial Decision.
- 11-12, *Denied.* See pars. 44 to 48 of this decision.
15-20
13 *Denied.* The Judge did not err in failing to make a speculative finding.
- 14 *Denied.* The alleged additional finding is actually a conclusion. In any event, the substance of this proposed conclusion is dealt with adequately in the Initial Decision and this decision, in connection with denial of the short-spacing waiver requests.
- 21,41 *Denied.* See par. 51 of this decision.
- 22-24 *Denied.* See pars. 6-7 of this decision.
- 25-39 *Denied.* These exceptions involve alleged errors in the findings and conclusions under the "studio move" issue. We completely agree with the findings and conclusions of the Judge, which are based on substantial evidence on the record as a whole, and more accurately reflect the record than do the "softened" self-serving findings and conclusions by Cowles.

- 40,43 *Denied.* See par. 114 of this decision.
- 44-46 *Denied.* The relevant findings respecting the relation between CCI and the PDS subsidiaries is supported by substantial evidence on the record as a whole.
- 42 *Granted.* See par. 148 of this decision.
- 47-71 *Denied.* These exceptions either attack the Judge's findings under the "mail fraud" issue or propose different or additional findings. The Judge's findings under this issue are supported by substantial evidence on the record as a whole and more accurately reflect the record evidence under the "mail fraud" issue than do the softened and selfserving findings proposed by Cowles. In any event, in view of the Judge's ultimate conclusion that no decisional significance was to be attached to the portion of the record devoted to the mail fraud issue and our own agreement with this conclusion, the exceptions here are not of decisional significance. See pars. 97-103 of this decision.
- 72 *Denied.* The conclusions excepted to are fully warranted by the findings under the mail fraud issue. In any event, the conclusions are not of decisional significance for reasons stated in connection with the ruling on Exceptions 44-71.
- 73,75-
82,86 *Denied.* The Judge did not err in failing to make the conclusions requested in these exceptions, because these conclusions are not warranted by the record evidence as a whole. In any event, the conclusions are not decisionally significant for reasons stated in connection with the ruling on Exceptions 44-71.

74, 83-85 *Granted*, to the extent the exceptions indicate there was no involvement by the Cowles (the renewal applicant) in any of the PDS activities. See par. 102 of this decision. Denied in all other respects.

DISSENTING STATEMENT OF CHAIRMAN RICHARD E. WILEY

Re: Daytona Beach Comparative Proceeding

I would like to emphasize at the outset of this dissenting statement that I do not disagree with the majority's conclusion that it would be inequitable, and in many ways unfair, to remove Cowles' license on the basis of the record before us. With the exception of one or two minor incidents, this licensee has been faithful to its obligations under our rules and has provided solid (although, in my opinion, not "superior") service to the community. This dissent is therefore based—not on my personal view of the equities involved—but rather upon a reluctant conviction that a grant of renewal would be inconsistent with the law as I understand it.

The Commission majority purports to base its decision in this matter on the traditional "comparative criteria" which were set forth in our *1965 Policy Statement on Broadcast Comparative Hearing*, 1 FCC 2d 893 (1965).¹ This

¹The *1965 Policy Statement* was not originally intended to serve as a guide for comparative cases involving a renewal applicant. *Id.* at 393 n. 1. It was quickly established, however, that this *Statement* would govern the introduction of evidence in these proceedings. *Seven (7) League Productions, Inc.*, 1 FCC 2d 1597, 1598-89 (1965). Because the agency has never successfully established criteria especially designed for cases involving a renewal applicant-new applicant comparison, we have been left with little choice but to rely on the 1965 criteria in these cases.

statement recognized that there are "two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and second, a maximum diffusion of control of the media of mass communications." *Id.* at 394. While my own philosophy and values do not suggest that Cowles should lose its license, I cannot agree that it is possible to remain faithful to the Commission's announced comparative criteria and still grant Cowles a preference over its competitor.

Under the 1965 *Policy Statement's* comparative elements of diversification of mass media control and "integration" of ownership and management, it seems to me that Central clearly is entitled to a preference on both counts. Moreover, as the majority concedes, Cowles should receive a demerit—in connection with the comparative criterion of best practicable service—for moving its main transmitter without prior Commission approval.

There remains but a single comparative element of decisional significance: the past programming service of the incumbent. Here, the Court of Appeals has told us that if an incumbent's record has been "superior," it is entitled to a "plus of major significance." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971). In the present case, the Commission finds that Cowles' past service meets this test of superior performance and that, on this basis, it is entitled to a preference which is decisive as to the criterion of best practicable service. This preference, in turn, resolves the entire proceeding in the incumbent's favor. In contrast, the Administrative Law Judge found that Cowles' past service was "thoroughly acceptable," a term which clearly does not connote superiority. In the absence of some serious deficiency, I personally believe that thoroughly acceptable service to the community should warrant renewal. However, under current standards, it appears to be insufficient to offset Cowles' disadvantage under the other comparative criteria.

All of this brings me to a conclusion which I have stated before and which I sincerely believe: that the present comparative renewal process simply does not make sense and that a complete reform is urgently needed.² I personally cannot believe that the American public derives any benefit out of the existing process by which we attempt to apply objective criteria (for example, integration of ownership and management) to the largely subjective (and, in most cases, unanswerable) question of which applicant will provide the best future service. In my judgment, it is time for the Commission and other branches of government to work together to bring rationality and order out of the existing chaos. In this regard, I believe that the comparative evaluation of a renewal applicant and a challenger should be eliminated and that all incumbents who do a good and faithful job of serving their communities should be renewed. In a non-comparative evaluation, Cowles clearly would have every right to anticipate renewal. As I see it, that should be enough to settle the matter.

My concern over our continued reliance on the 1965 *Policy Statement* is not, by any means, limited to the difficulties which exist in this particular case. It is clear to me that this agency's emphasis on diversification of media control and on the participation of owners in station management carries with it a considerable danger of restructuring ownership patterns through the comparative renewal process. Group owners, as a class, tend to have a built-in, and unwarranted, disadvantage with respect to both of these elements. Many of their stations are operated

²This conclusion is hardly unique. Indeed, virtually everyone who has studied the problem has seen a glaring need for reform. See, e.g. R.A. Anthony, "Towards Simplicity and Rationality in Comparative Broadcast License Proceedings," 24 *Stan. L. Rev.* 1 (1971); W. K. Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission*, Administrative Conference of the U.S. September 1962; Friendly, "The Federal Administrative Agencies: The Need for a Better Definition of Standards," 75 *Harv. L. Rev.* 1055 (1962).

by a semi-autonomous local management and, by definition, these owners possess a number of other media interests. In contrast, it is a relatively simple matter to put together a challenging group with no outside media interests and with a proposal to substantially integrate the owners into the management of the station. In a very real sense, therefore, the group owner begins our comparative proceeding with two strikes against him—as was true in this case.

While the 1965 criteria (including diversification and integration) originally were a creation of this Commission, it is not clear that we have a completely free hand in modifying these standards. The Court of Appeals has stated that “the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.” *Citizens Communications Center v. FCC, supra* at 1213 n. 36. In the light of this statement, the Commission itself has concluded that “whatever policy is developed [in the future] will take into account diversification as a factor that must be considered in a comparative renewal hearing.” *Second Report and Order on Multiple Ownership* (Docket No. 18110), 50 FCC2d 1046, 1088, *reconsideration*, 53 FCC2d 589 (1975). Thus, while the Commission has no interest in using the renewal process to restructure the industry, it has felt compelled to follow a comparative evaluation policy which points in that direction. This is true even though the agency has indicated that the degree of restructuring which it deems to be necessary has been already accomplished through rulemakings. See *Second Report and Order on Multiple Ownership, supra* at 1088. And, unlike our comparative proceedings, a divestiture ordered through rulemaking at least has the virtue of allowing the group owner (who, in most cases, has been a faithful public trustee) to recoup a portion of his investment through sale of the station to a new licensee.

Even under the element of "best practicable service," there is little reason to believe that our existing criteria are furthering a realistic public interest purpose. When we consider, for example, the element of participation of owners in station management, "integration," it is evident that the Commission majority has no firm commitment to the idea, expressed in the *1965 Policy Statement*, that an "integrated" management is inherently preferable to one which is operated on a semi-autonomous and professional basis. There is no *a priori* basis for such a preference; indeed, one might well assume that professional managers are typically selected on the basis of their experience and abilities whereas the owner-manager may achieve his status as result of wealth and other circumstances not directly related to the capacity to effectively manage a broadcast station. I am certain, furthermore, that there is no empirical evidence to support the preference set forth in the *Policy Statement*.

It is easy enough to state the problem: that the 1965 standards concerning diversification and integration advance no public purpose to which the agency is truly committed and, if implemented in a rigorous fashion, could well have a serious destabilizing effect on the broadcast industry to the detriment of the listening and viewing public. It is considerably more difficult, however, to set out a solution. While I believe that we administratively could eliminate the element of integration, it is highly questionable—with regard to the diversification criterion—that the courts would permit an abandonment of present policy without some statutory change.

In 1965, we made an effort to set forth reasonably objective factors to be considered in evaluating which applicant, among a number of competitors, would likely provide the best future service to the community. I believe, however, that no such criteria can possibly serve as a reliable guide to predicting human behavior. For example, former Chairman Hyde has stated:

[T]he automatic preference accorded local applicants disregards the possibility that, depending on the facts of a particular case, a competitor's proposed use of a professional employee-manager from outside the community might very well bring imagination, an appreciation of the role of journalism, and sensitivity to social issues far exceeding that of a particular local owner-manager.

Hyde, "FCC Policies and Procedures Relating to Hearings on Broadcast Applications," 1975 *Duke L.J.* 277 (1975). But intangibles such as "imagination" and "sensitivity" are not subject to objective evaluation or measurement and I, for one, question the wisdom of allowing an administrative agency to even attempt the task. Thus, we are left with a situation in which objective criteria are unreliable (and really useless) in predicting future behavior, and subjective criteria—while clearly relevant—are not susceptible to administrative evaluation.

In the final analysis, I must conclude that there really is no sensible basis by which applicants who are similarly qualified can be compared—and this is particularly true where the comparison called for is between a renewal applicant and a challenger with no past record of broadcast service. The process inevitably leads to complex hearings which drag on for years at great expense to all concerned. And, ultimately, we are left with a final decision which, at its best, can only rest on administrative hunch or intuition. In my opinion, this process simply does not serve the public interest. Accordingly, I am hopeful that the Commission and the Congress will recognize the need for prompt and effective legislative reform.

I dissent, in this case not so much to Cowles' renewal—which I think could be justified under a rational renewal policy—but to the process by which I feel compelled to oppose it.

DISSENTING STATEMENT OF COMMISSIONER
BENJAMIN L. HOOKS

In Re: Cowles Florida Broadcasting, Inc. *et al.*
(Docket Nos. 19168, 19169, 19170)

This is one of those cases. But for the challenge of a highly qualified competing applicant, it is unlikely that the WESH license would have been in serious jeopardy, irrespective of its deficiencies. However, in the law, "but for" are two very pivotal words of substantive import and a lot of litigants have found themselves on the unhappy side of "but for."

There is no doubt that comparing an incumbent licensee with a new competitor presents one of the more difficult analytical challenges faced by this Commission. Yet, given the fact that the spectrum is limited and that occupancy is not guaranteed in perpetuity, the law requires that each party seeking the license privilege for the same spectral slot be accorded quality in its quest. Hence, as stated in *Ashbacker Radio Corp., v. FCC*, 326 U.S. 327 (1945) and more recently in *Citizens Communications Center v. FCC*, 447 F2d 1201, (D.C. Cir. 1971), the Communications Act demands a fair, comparative hearing between or amongst the applicants. There is no gainsaying the law in this regard.

My colleagues in dissent in this case, however, suggest that we somehow abandon the comparative hearing process as altogether unworkable. But, I assert that the result reached by the majority in this case is *not* a result of the application of the criteria set forth in the 1965 Policy Statement;¹ the result is due to a *failure* to equitably apply the standards in the *Policy*.

The majority, by some phantom computer, allegedly

¹Policy Statement on Comparative Broadcast Hearings. 1 FCC 2d 393. (1965).

takes all of the comparative attributes of the new applicant, adds in the proper merit based on minority ownership,² subtracts some demerits from the incumbent for various offenses and, *presto*, calculates these unweighted pluses and minuses to come down on the side of the incumbent. The majority simply does not accord the new applicant the credit it is entitled to under virtually each of the six principal elements of the *Policy*.³

Thus, the fault in this case clearly lies not with our comparative standards, imperfect as they may be; the fault is that the majority—to reach its desired result—distorts the *Policy* almost beyond recognition. It seems to me illogical, then, to inveigh against a *Policy* which was all but ignored.

I want to clearly declare that I am receptive to *any* suggestion for improving our comparative process. I understand that we have been working on revising our standards for some time and plan to address the matter in the near future. Until such improvements are made, though, we cannot merely toss the *Policy* out; we are bound to apply that *Policy* with earnest zeal.

From our failure to do so, I must dissent.

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

Introduction

Despite the legal theory of the Communications Act that a license is not a property right,¹ the practical reality has been quite different, as all the world knows. Licenses are readily transferable and have substantial market value

²See *TV 9, Inc. v. FCC*, 495 F.2d 921 (D.C. Cir. 1973), *cert. denied* 419 U.S. 986 (1974); *Garrett v. FCC*, 518 F.2d 1056 (D.C. Cir. 1975).

³The six principal elements are: (1) Diversification of control of the media (considered the most important); (2) full-time participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient frequency use; and (6) character. *Policy Statement*, n. 1 above.

¹See 47 U.S.C. Section 309(h); see also Sections 301, 304, 307(d).

beyond the value of the transferred assets. That market value rests, or course, on an expectation that renewal is assured, at least unless the licensee has seriously misbehaved. This proactical reality was virtually undisturbed until 1969 when the Commission took the altogether remarkable step of denying a renewal applicant in favor of a competing applicant. *WHDH, Inc.* 16 FCC 2d 1 (1969), *affd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The history of comparative challenges since the *WHDH* case is one of confusion,² in part reflecting uncertainty as to just what the Commission held in *WHDH*. While an extended review of this history is unnecessary, a brief recital of the major events may help to add perspective to this case.

WHDH and After: How We Got Here from There

The best place to begin is with the *WHDH* case inasmuch as this is the wellspring from which most of these troubled waters have flowed.³ In 1957, after a long comparative hearing among four applicants, the Commission granted a permit to *WHDH, Inc.*, to operate on Channel 5 in Boston. On appeal, when it was discovered that the Commission's award might have been tainted by *ex parte* contacts by one of *WHDH*'s principals, the Court remanded to the Commission for an evidentiary hearing into the nature of those contacts. After a special hearing, the Commission, while refusing to disqualify *WHDH*, decided that the permit should be set aside and the entire proceeding be reopened. It did, however, permit *WHDH* to continue broadcasting by granting a special temporary authorization for a period of four months. After further comparative

²For detailed review of the history of comparative contests at renewal, see Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 Va. L. Rev. 471 (1975).

³On *WHDH* generally, see, e.g., Jaffe, *The FCC and Broadcasting License Renewals*, 82 Harv. L. Rev. 1693 (1969); Goldin, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 Harv. L. Rev. 1014 (1969).

hearings (this time among three of the four original applicants), the Commission again awarded a permit to WHDH. However, it made a grant to WHDH for only four months on the grounds that the improper approaches on behalf of WHDH to the chairman required a new look at the applicant at renewal time. In 1963 when WHDH filed for renewal, three competitive applications were filed (the Commission virtually invited comparative hearings by holding open the period for filing).⁴ In the new comparative hearing, the hearing examiner purported to apply the criteria set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), but nevertheless placed primary emphasis on the operating record of WHDH and on this basis renewed WHDH's license, in accordance with the policy established in *Hearst Radio, Inc. (WBAL)*, 15 FCC 1149 (1951), of favoring incumbent licensees. The Commission, 3 to 1, reversed the examiner, denied the application of WHDH and granted that of a competing applicant, Boston Broadcasters.⁵

⁴Meanwhile the original four-month grant had been appealed both by WHDH and by one of the losing applicants in the original case. While the appeal was pending the leading principal of WHDH (who had been implicated in the *ex parte* activities) died. The Court again remanded the case to the Commission to determine the effect of this death on the proceeding, and it authorized the Commission to combine the renewal proceedings with the proceedings on remand for reconsideration of the award of the four-month license, both to be conducted on a comparative basis.

⁵The crucial issues which are relevant here were the questions of the applicability of the Commission's 1965 Policy Statement on Comparative Broadcast Hearings and the weight to be given WHDH's past broadcast record. While the Commission in its 1965 Policy Statement indicated that it was not applicable to contests between a new applicant and a renewal applicant, it subsequently held that the Policy Statement should govern the introduction of evidence in proceedings where renewal application was contested, even though it reserved the question whether, and to what extent, the weights to be accorded to the various factors (in particular the weight to be given the past broadcast record of renewal applicants) should be the same as indicated in the Policy Statement. See *Seven (7) Leagues Productions, Inc.*, 1 FCC 2d 1597 (1965). The Commission in its original opinion in *WHDH* affirmed the applicability of the 1965 Policy Statement. The Commission reversed the examiner's heavy reliance on WHDH's operating record and in doing so appeared to overrule the old *Hearst Radio* case. Thus, while the Commission acknowledged that a past

On reconsideration the Commission adhered to the Order, and on appeal the Court of Appeals affirmed. While the original opinion in *WHDH* gave little hint that this was to be considered an exceptional case, on reconsideration the Commission, apparently reacting to the alarm of the industry at what appeared to be an opening up of all existing licensees to comparative contest at renewal, made an effort to distinguish *WHDH* from the normal case. At the end of its opinion on reconsideration, 17 FCC 2d 856, 762-73, the Commission noted:

"In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although *WHDH* has operated station *WHDH-TV* for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did *WHDH* receive a license to operate its television station, and even then its license was issued for a period of four months only because of the Commission's concern with the '... inroads made by *WHDH* upon the rules governing fair and orderly adjudication....' Again, unlike the usual situation when an applicant files for renewal of license, after *WHDH* filed its renewal application we issued

record of an applicant was relevant, this record was not allowed to enter into the comparative evaluation because it did not "demonstrate unusual attention to the public's needs or interests." Once *WHDH*'s past broadcast record was ruled out of the case and it was determined that *WHDH* stood on essentially the same footing as the other applicants, the results were foreordained. *WHDH*'s ownership by the Herald Traveler resulted in a demerit on the very important diversification criterion. *WHDH* was also found inferior on grounds of integration of ownership and management. There was also entered a demerit against *WHDH* because of its failure to obtain approval prior to transfer of *de facto* control.

an order directing that new applications for Channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license."

On appeal the Court took special note of this language in the reconsideration opinion in sustaining the Commission's apparent departure from *Hearst* and its interference with "legitimate renewal expectancies implicit in the structure of the Act." 444 F.2d at 854.

Despite the effort in the reconsideration opinion to treat *WHDH* as an exceptional case, industry reaction continued to be strongly negative. As a result, legislation was introduced which would have required a two-step procedure in renewals: first, the Commission would consider the incumbent's request for renewal; and, if and when it found the past record of a licensee inadequate in terms of the "public interest standard," it would go to the second stage and receive competing applications. The proposed legislation died (though its spirit was revived in subsequent bills which almost passed the 93d Congress and in proposed legislation currently pending) when the FCC came forward with its own "solution," *Policy Statement Concerning Comparative Hearings Involving Regular Applicants* 22 FCC 2d 424 (1970). In its 1970 Policy Statement the Commission similarly sought to protect incumbent licensees against a rash of challenges from new applicants. The 1970 Policy Statement provided that in case of a comparative challenge to a renewal applicant, the renewal applicant would be preferred over a newcomer whenever his program service during the preceding term had been "substantially attuned to meeting the needs and interests of its area," and the operation of the station had

not "otherwise been characterized by serious deficiencies." The Commission stressed that the words "substantially attuned" meant something more than "minimal" service. While the FCC's Policy Statement left to the hearing process the task of defining "substantial service," in 1971 the Commission instituted an inquiry to explore the possibility of establishing guidelines defining "substantial service." In particular, it proposed some general guidelines for quantitative superiority in two areas, local programming and news/public affairs programming. *Formulation of Policies Relating to the Broadcast Renewal Applicant*, FCC 2d 580 (1971). That inquiry is still outstanding.

Shortly thereafter the Court in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), held the 1970 Policy Statement to be invalid as a violation of Section 309(e) of the Act and the *Ashbacker* rule which (the Court held) required a full hearing in which all parties could compete on all criteria relevant to the grant of a license. However, the Court did not preclude the Commission from giving significant weight to the past broadcast performance of an incumbent licensee; it specifically recognized that "superior" performance should be a "plus" of major significance in renewal proceedings. Thus, despite the Court's insistence on a "full hearing" in which all parties stand on the same procedural footing, the Court in effect ratified the Commission's determination that an incumbent could be preferred (could "reasonably expect renewal") on the basis of its past broadcast record alone. Thus, the only point of major difference between the Court and the Commission appears to be the standard for determining when that past broadcast record is sufficient to support that expectation of renewal.⁴

Even as to this there is a substantial doubt as to the significance of the difference between the Court's standard and that of the Commission. Following the Court's decision

⁴See Geller, *supra*, 61 Va. L. Rev. at 487.

the Commission issued a *Further Notice of Inquiry*, 31 FCC 2d 443 (1971), in which it attempted to clarify its earlier Notice by emphasizing that its concept of "substantial performance" meant something more than "minimal performance." However, it refused to embrace the Court's standard of superior service, inasmuch as that suggested some kind of comparative standard which could be selfdefeating if everyone improved its performance. The Citizens Communications Center, believing the Commission's statement to be at odds with the Court's holding in 1971, petitioned the Court to clarify its mandate and to direct the Commission to follow the "superior service" standard. The Court did reiterate its commitment to the concept of a superior service but refused to direct the Commission to do anything further than it had already done in initiating the Inquiry. See *Citizens Communications Center v. FCC*, 463 F.2d 822 (D.C. Cir. 1972).

Since that time the Commission has issued still further notices of inquiry into the formulation of guidelines for renewal, 43 FCC 2d 367, 1043 (1973) while Congress has debated further legislation to enact the essential substance of the Commission's 1970 Policy Statement.⁷ However, in view of *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.) cert. denied, 423 U.S. 926 (1975), it is doubtful that the Commission's Inquiry or Congress' proposed legislation will have any practical significance. If there was any fear of the Commission's determination to treat *WHDH* as a stroke-of-lightning-once-in-a-lifetime event, *Fidelity* would have allayed it.⁸ By any fair assessment, the incumbent in

⁷Proposed legislation which would have substantially accomplished this passed both House and Senate in the 93d Congress, only to die when no conference committee was convened. See *Broadcasting*, Dec. 16, 1974, pp. 19-20. Similar legislation is currently pending in the 94th Congress.

⁸The Commission's decision in *Fidelity* was foreshadowed by *Moline Television Corp.*, 31 FCC 2d. 263 (1971) where the Commission, 4-2, overlooked a serious promise-versus-performance issue (the promises being those which helped the incumbent to prevail over competing applicant in

Fidelity, RKO, was a "poor contender," as the Court conceded in affirming the Commission's renewal of its license, 515 F.2d at 702. In terms of its past performance, the incumbent was adjudged only "average"—well below the "substantial" performance needed to earn a "plus of major significance," and indeed insufficient to earn a plus of any significance, 44 FCC 2d at 133.⁹ Nor did the incumbent demonstrate any evident superiority over the challenger in respect to any other comparative criterion. While the challenger (*Fidelity*) made a similarly unimpressive impact on the Hearing Examiner (who nevertheless preferred it over the incumbent), on the Commission and on the Court, it did offer what any objective observer would concede to be a comparative advantage on what the Commission had in *WHDH* treated as an important comparative criterion, diversification of media interest. Overlooking that comparative advantage was not easy, but the Commission was equal to the task. Pointing to the other competing media in the Los Angeles market, and noting also that the challenger also had some other media interests (trivial in comparison to those of the incumbent RKO) the Commission concluded that there was no basis for preferring the challenger on this count, *id.* at 133-34.

All in all, *Fidelity* was a *tour de force*, accomplishing even more than the Commission had purported to accomplish with its ill-fated 1970 Policy Statement. In 1970 the Commission merely purported to guarantee renewal to an incumbent which demonstrate "substantial" service. In *Fidelity* it managed to grant renewal to an incumbent who demonstrate "average service," who was actually the

obtaining the license in the first place) in order to find the incumbent's past record "superior." However, much as the Commission may have strained to renew the incumbent's license in *Moline*, it was nothing compared to the effort in *Fidelity* where the incumbent won despite the fact that even the Commission would not characterize the incumbent's record as "superior"—or even "substantial."

⁹To the Examiner in *Fidelity*, even the term "average" magnified the quality of the incumbent's performance. See 44 FCC 2d at 219-21.

weaker candidate on one major comparative criterion, and not materially better on the others (integration and local ownership). In the end it is hard to disagree with Judge Bazelon's caustic assessment of the Commission's opinion as little more than a disingenuous masquerade for a predetermined vote in favor of the incumbent, 515 F.2d at 726, but it was the Court's affirmance as much as the Commission's decision which prepared the stage for the decision in the present case, which should set to final rest any lingering fears that the Commission intends to use the comparative process to dislodge incumbent licensees. Barring misbehavior serious enough to disqualify regardless of the comparative contest, a licensee may expect renewal in due course.¹⁰

*The Art of One-Upsmanship:
How to Succeed in a Regulated Business
Without Really Trying*

To the Perceptive observer of the history of renewal contests, it will doubtless be apparent by now that there is less to such "contests" than meets the eye, that in fact it is not a real contest between two applicants but a pretend game played between the Commission and the public. The outcome of the game is predetermined; the art (and the sport) is to maintain interest until the inevitable outcome is registered. The Commission's role is to look judicious in pursuing a process that yields only one result; from the public the fun is watching the show and trying to anticipate how the Commission will finesse the result in the particular case. It rather resembles a professional wrestling match in which the contestants' grappling, throwing, thumping—with attendant grunts and groans—are mere dramatic conventions having little impact on the final result. Of

¹⁰Of course, as noted below, the licensee still has legitimate reason to fear the large expense of going through this ritualistic process.

course, wrestling fans know the result is fixed and generally in whose favor; still they fill the bleachers to see how it is done. So it is in the present case.

The Commission begins by examining certain "engineering issues" dealing with minimum mileage separation requirements. Both applicants proposed transmitter sites (Cowles proposes to change its present site) that entail mileage short-spacings, and thus require waivers of our mileage separations rules. Although these issues receive considerable attention in the Commission's opinion, they are actually irrelevant to the comparative choice between the two applicants. Like the ALJ, the Commission finds neither waiver is warranted; it also apparently agrees with ALJ that there is no basis for a preference to either applicant on this issue.

The next issue is the main studio issue—whether Cowles moved its main studio unlawfully and, if so, whether it should be disqualified on that account. The ALJ found that there had been a transfer of the main studio without prior Commission authorization, but he excused it on the ground that Cowles' service had not been hurt by it. The Commission agrees. Even accepting the correctness of the Commission's findings here, it should be stress *that this is simply the lack of a decisively negative finding against Cowles, not an affirmative finding in its favor*. Indeed, as the Commission concedes, the *de facto* transfer is a comparative demerit.

Potentially more serious than the studio move is the involvement of Cowles' parent corporation in mail fraud. The ALJ found sufficient evidence of fraud but, as with the studio move, felt it was not disqualifying since it did not implicate Cowles' broadcast operations. The Commission agrees with the result, though on a slightly modified

ground—essentially a belief that the sins of the fathers should not be visited on the heads of their offspring. Indeed, the Commission goes so far as to find no warrant even for assessing a comparative demerit against Cowles for the actions of its parent. However, lest it be thought to be encouraging misbehavior, the Commission does issue a stern warning that “our affirmance of the Judge does not render unlawful conduct of an applicant in non-broadcast activities irrelevant.” It further intimates that inquiry into the fraud issue at the hearing was proper even though it related only to the non-broadcast activities of a parent corporation. In short the Commission wants it clearly known that it does not countenance fraud even if it does not propose to do anything about it unless the licensee or its principals are directly involved in it.¹¹

This brings us to the comparative issue, the central part of the case. Up to this point the contest is in equipoise with neither applicant having an edge over the other, except to the extent that Cowles has some kind of demerit for the unauthorized relocation of its main studio. The key comparative issues are: (1) diversification of media interests; (2) integration of management and ownership; (3) minority involvement,¹² and (4) best practicable service. In addition, there is the studio location issue, noted earlier, which the Commission treats as a matter for comparative evaluation even if not a basis for disqualification.

¹¹Compare *Western Communications, Inc. (KORK-TV)*, — FCC _D_ — (1976), disqualifying an incumbent which had itself engaged in fraudulent practices (“fraudulent billing”).

¹²Although the Commission treats this as essentially a part of the integration issue, I think it is legally a separate issue which, whatever decisional weight is given to it, should not be wholly submerged in the integration issue. See *Garrett Broadcasting Service v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975); *TV 9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied 419 U.S. 986 (1974).

With respect to diversification there is no doubt that Central is superior to Cowles; the only question is the weight to be assigned that superiority. The Commission joins the ALJ in Central's contention that this superiority is decisive, but having decided the obvious, the Commission fails to explain just what the significance of Central's merit is.

The Commission's treatment of the applicants' integration proposals is short-through with confusion. Cowles has no integration of ownership and management at all; Central, by contrast, proposes a modest degree of ownership participation in management, an integration plan which the Commission concedes "is somewhat stronger than that of Cowles." But what the Commission makes of this finding is not entirely clear, for it goes on to find that while Central's proposal "warrants a 'merit,' ... we do not think that merit is sufficiently substantial to justify a preference." What weight, then, is this merit to be given? As with diversification, all we know is that however much weight it is accorded, it is not enough to carry the day for Central.

The same vagueness characterizes the Commission's disposition of the minority ownership question. The Commission concedes that Central is entitled to an edge over Cowles because of the involvement of two Black stockholders, one of whom is an officer and a director of Central. But what weight is to be given to this "plus"? After a scholastic discussion of the fine distinctions between "merit" and "preference" that would do honor to Thomas Aquinas,¹³ the Commission concludes, once again, that whatever the weight to be given Central's superiority on this score, it is not enough.

¹³In fairness to the Commission, it must be noted that the Commission's semantic disquisition is at least in part, the product of the Court's gloss of those terms in the *Garrett* and *TV 9* cases, *supra*.

At this point, it must occur to the curious to ask, "enough" for what? So far Central has prevailed on three standard comparative issues and has also received some kind of advantage for not having violated the law—Cowles having done so by moving a main studio without prior authorization. Even granting that Central's superiority is not overwhelming on any of these counts, the fact remains, *Cowles at this point has nothing*. Whether one calls the points "preferences," "merits," "plusses" or gumdrops, the score is still 4 to 0 in Central's favor as we enter the last stage of the game—wherein we address the question of best practicable service.

On the best practicable service criterion the ALJ awarded Cowles a "definite plus" for its auxiliary studios serving the Orlando area and a plus of some kind for Cowles' "thoroughly acceptable" record, which he evidently thought promised more for the future than Central's paper promises. The Commission, finding the first plus at odds with the demerit assessed against Cowles for moving its main studio to Orlando, overrules this finding and reverses the ALJ's characterization of Cowles' record as merely "thoroughly acceptable." Reexamining the record for itself the Commission finds it is "superior." On the strength of this last finding Cowles wins.

Those who have a head for numbers but not for this peculiar game may be baffled to explain Cowles' victory. Down by a score of 4 to 0 Cowles comes forth at the last minute, scores once, and wins. But, of course, the score is meaningless unless you understand how the game is played. According to the rules, reviewed earlier, where the game involves a contest between a renewal applicant and a "newcomer," if the renewal applicant has a "superior" record of past performance—which is to be distinguished from one that is merely "thoroughly acceptable"—it receives a "plus of major significance." See *Citizens*

Communications Center, supra. Although the rules do not state what weight is to be given a plus of major significance (or what constitutes "superior" service), the Commission's decision indicates that the weight can be expected to be greater than any number of mere "plusses," "merits," "preferences," or gumdrops which any challenger can earn. In short, if the incumbent scores "superior" on past performance, the game is his.

At this point one might think it important to know what constitutes "superior performance."¹⁴ The answer I derive from the Commission's opinion is that "superior" means whatever the licensee has done, providing the licensee itself has not seriously misbehaved. Cowles' record of positive achievements must not have seemed to overwhelming even to the Commission majority, who had to conduct a special search of the record to find evidence of Cowles' "superior" performance. This evidently is the Commission's version of the Court of Appeals' "hard look" requirement:¹⁵ it looks hard until it finds what it is after. Having found it, the Commission then seeks to invest it with the sura of administrative expertise by announcing that ultimately, it is a matter of "administrative feel acquired through years of overseeing television operation." It is a fitting capstone to this game that, after an elaborate hearing process, a fine combing of the applicant's respective merits and a long deliberation on the weights to be accorded thereto, the Commission declares that picking the winner is a matter of

¹⁴As it turns out, however, this is not really important, for as was demonstrated in the *Fidelity Television* case, *supra*, even an "average performance" can be made to support a victory for the incumbent.

¹⁵See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Greater Boston Television Corp.*, *supra*, 444 F.2d at 851.

"administrative feel." One thinks of sitting at the feet of a great Zen master waiting to hear the secrets of life and all that comes forth is an inscrutable koan.¹⁶

I do not say that the result in this case could not be justified by a rational policy. I only say that it cannot be justified by the policy which the Commission purports to follow.¹⁷ And the process has nothing whatsoever to do with the outcome.

Regulatory Reform: Adjusting to Reality

Something has to be changed.

One place to begin is with a legal recognition of the reality: a licensee has a property right in its license which is defeasible only for serious misbehavior. I recognize, of course, that the Act provides that the licensee has no vested property interest. But, as I said at the outset, the statutory theory has been nullified by immemorial practice. Moreover, notwithstanding the *Citizens Communications* case, this practical reality has been judicially affirmed. See

¹⁶Sample: A monk asked a Zen master: "All things are reducible to the One, but where is the One reducible?" Replied the master, "When I was in the district of Ching I had a robe made that weighed seven chin." D. T. Suzuki, *Zen Buddhism*, 152 (1956). In fairness to Zen it should be pointed out that the true koan, however inscrutable intellectually, is nevertheless designed to produce enlightenment—startling the mind into intuitive truth. The Commission's koan by contrast has the opposite mission: to numb the mind and obscure what is going on.

¹⁷The Commission purports to reward "superior" performance and thereby to maintain incentives for high performance. Unless Cowles' performance is judged superior, the Commission says, other incumbents "will be tempted to lapse into mediocre performance." As Winston Churchill once remarked, "I should not have thought it possible to have stated the opposite of the truth with greater preciseness." In fact, by treating an ordinary (if "thoroughly acceptable") performance as superior, the Commission signals all licensees that their licensees are safe from challengers, at least so long as they do not egregiously misbehave. Whether or not that might be a reasonable policy to pursue, it is not the policy which the Commission purports to follow.

*Fidelity Television Inc. v. FCC, supra.*¹⁸ If, however, the Commission believes that the Act binds it to pursuing this present process of comparative evaluation, then it ought to seek legislative or judicial amendment. Failing such amendment, it should pursue the theory of the Act to its logical terminus: all applicants should be treated alike. Of course, we would still be stuck with a comparative process that experience has shown to be arbitrary and inefficient, but we would at least be free of the added complication of jiggering the process in order to find "superior" performance, in order to give a "plus of major significance," in order to justify a predetermined grant to the incumbent licensee.

I recognize that this latter course might produce chaos (and it would certainly produce panic) in an industry so accustomed to stability. I have no desire to produce such results, but I see no other way of faithfully adhering to the theory that licenses confer no property right and no guarantee of renewal. The alternative—and I think far more sensible—course would be to adhere to the result obtained here, but abandon the comparative hearing process and the legal theory it purports to serve. This approach would simply accord legal recognition to the reality that licenses do confer property rights. Such a recognition would not, of course, mean that the rights are absolute; as is true of all property rights the license right would be burdened with certain obligations (the general public service obligations imposed on licensees); and they would be defeasible upon a showing that the licensee has seriously abused his rights—for example, by using them to perpetrate a crime.

¹⁸*Cf. Greater Boston Television Corp., supra*, 444 F.2d at 854 where the Court noted that had the Commission's action in refusing to renew WHDH's license not been exceptional, it would have raised a question whether it "unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act."

Legal recognition of vested property rights, and abandonment of the comparative renewal process, also necessarily calls into question some of the underlying premises on which licenses are awarded in the first place. Inasmuch as I have already strayed beyond this case so far as to raise the question of renewal reform, a few further observations on the more general problem of licensing can do no harm.

The Commission's licensing process has been the subject of criticism since its earliest days. The criticism has ranged broadly over all aspects of the procedures employed to the criteria used in licensing broadcast applicants. But of all aspects of broadcast licensure that have been singled out for criticism, none has been more frequently, more trenchantly and more persuasively criticized than the process of choosing among competing applicants—the FCC's equivalent of the Medieval trial by ordeal. For a succinct summary of the problem, Commissioner Lee's description of the process can scarcely be improved upon:

"Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a tortuous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense—but comes the oral argument and all of the losers concentrate their fire on the 'potential' winner and the Commission must thereupon examine the claims

and counterclaims, 'weigh' the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 percent of the cases. The real blow, however, comes later when the applicant that emerged as the winner on the basis of our 'decisive' criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a 'hell of a way to run a railroad. . . .'

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 404, 405-06 (1965). Commissioner Lee is correct: this is a hell of a way to run a railroad. But is it the only way?

So long as the Commission must adhere to the ritual of comparing the respective "merits" of applicants, I see no hope for meaningful reform of the licensing process. There are, of course, contrary views even among those who concede the process requires improvement.¹⁹ I myself once thought the process could be improved short of a total overhaul,²⁰ but I know better now. A few marginal improvements could be made in the procedures and the criteria for choosing among competing applicants, but

¹⁹See Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 Stan. L. Rev. 1 (1971), proposing a rather elaborate system of comparative evaluation based on fixed points awarded to each applicant under each policy criterion, ranked according to importance.

²⁰*Radio Spectrum Regulation: The Administrative Process and the Problem of Institutional Reform*, 53 Minn. L. Rev. 1179, 1260-61 (1969).

they would not significantly improve the overall process or the results. For the most part, the quality of the proposals we look at is meaningful only in terms of thresholds. An applicant's engineering proposal will be either sound or unsound. The technical and business people an applicant intends to manage the station will be either acceptable or unacceptable. The ascertainment of community problems, needs and interests will be either adequate or inadequate. Programming proposals should not be combed minutely, if indeed they should be examined at all, for obvious First Amendment-related reasons. Certainly if they surpass some minimum level of acceptability, nothing further should be required. To go beyond an inspection of basic qualifications is productive of nothing but senseless waste of resources—those of the applicants and our own. And yet confining ourselves to basic matters which may²¹ have some meaningful effect on performance almost invariably proves insufficient for making the choice. Particularly where only paper records are involved, it is unlikely that many who survive the initial staff scurrying which precedes the hearing will be ruled out on the strength of a basic deficiency, and it is even more unlikely that all applicants but once will be eliminated by this process.²²

²¹I say "may" advisedly. I pass over the question of probable implementation which is an additional problem. It should, however, be mentioned that by introducing this element into consideration the present comparative system tends to create a "Catch 22": applicants are induced to compete on the basis of promises, but if an applicant gets carried away with its promises it may find them being discounted on the ground that they are unlikely to be effectuated. See 1965 *Policy Statement*, *supra*, 1 FCC 2d at 398; *Fidelity Television, Inc.*, *supra*, 515 F.2d at 700-701.

²²It is, admittedly, not impossible. See *Goodson-Todman Broadcasting, Inc.*, 45 FCC 2d 573 (1973) where the Commission, relying on Section 307(b) of the Act, disqualified all comparative applicants but one on the strength of purely technical considerations without reaching the standard comparative issue. It is noteworthy, however, that the Court remanded *Goodson* for further justification for by-passing of a full comparative hearing. *Pasadena Broadcasting Co. v. FCC*, — F.2d — No. 75-1002 (D.C. Cir. 1975).

If there are no meaningful distinctions between applicants, then the choice between them will be, perforce, arbitrary. Arbitrariness *per se* is not necessarily a bad thing: government does hundreds of things arbitrarily, like deciding which tax returns are to be audited. But if a government agency is required to make an essentially arbitrary choice, it is important that the arbitrariness equates to randomness rather than personal whim. The wheel of fortune—a lottery—is much to be preferred to that different class of arbitrary criteria, the capricious preferences of bureaucrats. As Judge Leventhal said in dissenting to an affirmance of an FCC comparative hearing award in *Star Television Inc. v. FCC*, 416 F.2d 1086, 1089, 1094-95 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

"I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to 'demerits' in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes concerning intuition that outruns analysis. the possibility that an agency may come

to the point of resing on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise, I for one would be prepared to sustain an action presented with such candor, but pause in saying that, to note that such a candid disclaimer would perhaps crystallize other and more acceptable solutions. Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the opportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmissible means of deciding the undecidable, provided the ground rules are known in advance."

In the circumstances here a simple lottery is a sensible method of choosing among qualified applicants (those meeting minimal, threshold standards),²³ but an even better mechanism would be an auction among such applicants. An auction combines the simplicity of the lottery with two additional virtues: one, it would allow the public to recoup the economic value of the benefits conferred upon private licensees;²⁴ two, unlike a lottery

²³Cf. Anthony, *supra*, at 71-72 who proposes the use of lottery between applicants who score evenly under this fixed point system. Chairman Wiley has also endorsed this means of selecting an applicant whose basic qualifications have otherwise been established. *Broadcasting*, March 29, 1976, p. 24. There are precedents for the use of a lottery in government allocation of resources. One notable example is the use of lotteries by the Bureau of Reclamation for a brief time after World War II in order to distribute land and water rights on federal lands. The lotteries usually were subject to veterans' preferences and there were also qualifications imposed on land recipients.

²⁴This merit commends the use of a pricing mechanism generally regardless of whether competing applications have been filed. We do, of course, already have a system of modest license fees, but these only defray the FCC's cost of licensing, not the value of the spectrum right conveyed to the licensee. While a general user fee system has great merit, its implementation raises questions beyond those discussed here. See *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974). I am interested in the problem of finding a mechanism for choice among competing applicants; recapture of resource value is a quite distinct, and rather more complicated, question.

an auction measures the intensity of individual preferences, in accordance with the prevalent standard for allocating resources in our economic system.²⁵

Auctioning frequencies is not, of course, a new idea²⁶ though it could not be said to have a wide following. I concede that for the Commission to implement an auction scheme would push its present legislative powers to the limits; nevertheless, administrative action to implement some such scheme cannot be dismissed out of hand.²⁷ Legal considerations aside, however, proposals to auction licenses to the highest bidder have been criticized on grounds of social policy. It is said, for example, that an auction (1) would be an abandonment of "public interest considerations," (2) could lead to the view that the winning bidder has a property right in the license, and

²⁵This particular virtue of the pricing mechanism has special importance here since it would permit those who have an intense desire to operate a station, for social as well as economic reasons, to express that intensity in bidding for a license. A lottery does not permit this.

²⁶The seminal exposition of the idea is that of economist Ronald Coase, *The Federal Communications Commission*, 2 J. Law & Econ., 1 (1959). Subsequent discussion have extended the same idea to allocation of frequency rights more generally. See, e.g., Coase, *The Interdepartment Radio Advisory Committee*, 5 J. Law & Econ., 1 (1959). Subsequent discussion have extended the same idea to allocation of frequency rights more generally. See, e.g., Coase, *The Interdepartment Radio Advisory Committee*, 5 J. Law & Econ. 17 (1962); De Vany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal Economic-Engineering Study*, 21 Stan. L. Rev. 1499 (1969). See generally, H. Levin, *The Invisible Resource* (1971).

²⁷The courts have said that competing applicants must be comparatively evaluated in order to find the one "best" fitted to serve the public interest. See, e.g., *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949); *Citizens Communications Center, supra*. (But see Judge Levanthal's dissent in *Star Television, Inc., supra*). See generally, Anthony, *supra*, at 75-84. On the other hand, the courts have also told us that our legislative powers are broad and flexible. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Without supposing this constitutes authority to do anything we want, I would be bold enough to interpret this mandate to permit us to scrap the comparative hearing process and to substitute an auction system in its place. Hearings then would be limited to basic qualifications of applicants to bid. Cf., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

(3) would favor the wealthy.²⁸ None of these objections seems to me compelling.

The first objection is a little vague but it seems to harbor both a misunderstanding of how the auction system would work as well as a misunderstanding of how the present system does work. An auction system need not, and in my proposal would not, eliminate all inquiry into licensee qualifications. I do not propose (nor do I know of any auction proponent who proposes) to waive minimum standards of fitness or eligibility for anyone who comes in with enough cash. On the contrary, only those applicants who meet the basic legal and character qualifications for licensees would be eligible to bid. Thus, under any circumstances, successful bidders at auction would be at least as well qualified as licensees whose applications are uncontested. When all is said and done, that is all we can realistically expect from the comparative hearing process also. The idea that comparative hearings really select out the "best" candidate is naive. Seldom is there any single "best" candidate; more often than not, the candidates are, for all practicable purposes, fungible. In any case, history shows that the comparative process, despite adjustments made in it over the years, is not designed to discover "the best," and even where the best may be selected there is no mechanism (other than the general rule against trafficking)²⁹ which prevents the winner from ultimately

²⁸See e.g., Anthony, *supra*, at 100-101. I once harbored similar views, see *supra* note 20. The objections now seem to me so very weak, I am hard pressed to explain how I embraced them. The only explanation that comes to mind is that of Dr. Samuel Johnson in explaining an error in his celebrated dictionary. Asked by a woman horse fancier how he came to define "pattern" as the knee of a horse, Johnson replied, "Ignorance, Madam, pure Ignorance."

²⁹Under 47 C.F.R. Section 1.597, a transfer within three years raises a *prima facie* case of trafficking warranting a hearing, but waivers are so numerous they almost swallow the rule.

selling out to a less qualified candidate.³⁰

As to the second objection, that an auction would lend credence to the view that licenses are a property right, it is sufficient to respond that such a property right does in fact exist as a consequence of the historic practice of renewing licenses except for misbehavior. To pretend otehrwise is to blink reality. What needs to be considered is, what follows once we recognize this reality? I believe what follows is a reconsideration of the basis on which such property rights are acquired, and it is this that leads me to the proposed auction.³¹

Finally, the objection that an auction would favor rich over poor hardly seems a decisive objection since the smae can be said of any pricing system.³² Why is it, for example,

³⁰In considering a proposed assignment of license or transfer of control, the Commission may not consider whether the public interest would be better served by someone other than the proposed assignee/transferee before the Commisison. 47 U.S.C. Section 310(b); *Ron Campbell*, 58 FCC 2d 208 (1976).

³¹I do not propose an auction at renewal. On the premise that the licensee has a property right (defessible only for misbehavior) an auction is pointless. With regard to licensees who purchased their rights at auction the government would, of course, already have recouped the value of the right in the initial auction, and any other person who wanted the license could do precisely what is done today; buy it directly from the licensee. As for existing licensees, as a concession to adminisitrative practicability as well as political acceptability, I would simply vest *de jurs* the rights they have *de facto*.

I do not suggest, however, that the process of renewal of should be terminated, though the present three-year renewal cycle seems to me inefficient and ineffective. On the premise that the licensee would continue to have public service responsibilities (such responsibilities would, of course, affect the purchase price but they are not necessarily inconsistent with an auction system), I see some merit in a periodic scrutiny of performance. Enforcement of such responsibilities need not be greatly different from what it is today — such as it is.

³²It should, of course, be noted that this does not mean that the poor are necessarily excluded. As Professor Coase, *supra*, 2.d Law & Feon at 19-20 has pointed out, it is not simply the ability to pay but the *willingness* to pay that dictates how resources are distributed by the pricing system, and the willingness to pay is a function of the intensity of a buyer's preferences as well as of his wealth.

any more pertinent to broadcast licenses than land or mineral leases or the use of dialysis machines?³³ In any case, it is indulging fantasy to pretend that an open pricing system would lead to greater control of licenses by the rich than does the present system, given the current expense of obtaining a license, particularly in the context of a comparative hearing. Anyone who believes that the comparative hearing process is available to everyone regardless of wealth must also be willing to believe in Santa Clause.³⁴ Indeed, it is not a great exaggeration to describe the comparative hearing process as, in effect, a bidding system, except that money goes not to the owner of the resource, the public, but to lawyers representing the contestants.³⁵ As a practical matter the poor are excluded from the present system far more effectively than they would from an auction system, because of the difficulties of raising the capital necessary to engage in such an uncertain venture as applying, and competing, for a license. Given the profitability of broadcast stations, lending institutions are ordinarily well disposed to advance the requisite capital to buy a station, or even to build it once a clear license grant has been made. One need not be wealthy

³³Of course, as in the case of dialysis machines, society may provide the funds with which to purchase needed goods and services. So too with broadcast licenses, it may be desirable to provide a special subsidy to certain groups to enable them to bid for broadcast frequencies. This could be done in a variety of familiar ways loans, loan guarantees, special assistance grants, etc. Such a system would be far more effective in helping disadvantaged groups than the present administrative scheme of "merits" "preferences" and pretence.

³⁴A rough idea of what it costs to participate in a contested proceeding can be obtained from the *WPIX TV* comparative renewal case where costs of some \$2 million were reportedly incurred by the challenging applicant and \$1.5 million incurred by the incumbent just to proceed through the initial hearing stage. *Broadcasting*, Apr. 7, 1976, pp. 73-74. This case went through an extensive hearing before an ALJ, but has not yet done the entire appellate route to the Commission and the Court of Appeals.

³⁵Indeed, given the tax deduction for attorneys fees, the public owner ends up paying to "self" its frequency rights.

to obtain such financial support, because the security for it lies in the relatively low-risk, and high-profit character of the enterprise. The real problem lies in raising the capital necessary *to compete* for a contested license, a high-risk, low profit³⁶ enterprise. It is in this latter respect that the present system most effectively screens out the poor. This is quite senseless as well as discriminatory: the risk capital is required not because of the risks inherent in the enterprise itself but because of risks in an artificial licensing process which shows no demonstrable relationship to superior performance or public service in the operation of the station.

While there are modestly hopeful signs of increased support for some form of auction system,³⁷ the day of its acceptance by the Commission, the Court or Congress, still seems distant. Prevailing myth and ancient prejudices conspire the simple lassitude against any such "radical" reform. In the end, too many people find it too comfortable to stay with the old ways, bad as they are, rather than to chart a new and uncertain course full of imagined perils:

"... in the night, imagining some fear
How easy is bush supposed a bear."

Shakespeare, "A Midsummer Night's Dream," V, i., 21-22.

³⁶I use the phrase low profit to characterize the returns competition for a contested license because if anyone can enter the competition, entry will continue as long as the expected returns to the next possible applicant are positive. Thus we would expect competition between applicants to drive returns on investment in license competition down to the norm for similar enterprises elsewhere in the economy.

³⁷Let it be supposed that support for the auction proposal is confined to conservative economists in the "Chicago" tradition. I note that the basic idea has been endorsed by (among others). Professor Paul Samuelson, *Economics*, 480 (8th ed. 1970) and a similar user for system by Senator William Proxmire, *Broadcasting*, May 7, 1973, p. 47. See also Congressman Henry Reuss' proposal in 1958 to require the Commission to establish haste threshold qualifications of competing applicants and, in the event of a tie, to award the license to the highest bidder. See H.R. 11893, 85th Cong., 2d Sess. (1958).

**Programming Policy Statements
Reconsideration, Grounds For
Rules, Delay Of Implementation**

Petition for reconsideration of decision denying modification application (60 FCC 2d 372), denied. Matters fully disposed of in earlier proceeding will not be reheard. Allegations that adoption of new field strength curves and of skywave interference justify reconsideration were untimely when raised only after issuance of final decision. Use of term "superior programming" in decision clarified.

**BEFORE THE FCC 77-1
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In Re Applications of

**COWLES FLORIDA
BROADCASTING, INC.
(WESH-TV), DAYTONA
BEACH, FLORIDA**

**Docket No. 19168
File No. BRCT-354**

For renewal of license

**COWLES FLORIDA
BROADCASTING (WESH-
TV), DAYTONA BEACH,
FLORIDA**

**Docket No. 19169
File No. BPCT-4158**

**For modification of authorized
facilities**

**CENTRAL FLORIDA
ENTERPRISES, INC.,
DAYTONA BEACH,
FLORIDA**

**Docket No. 19170
File No. BPCT-4346**

For a construction permit

MEMORANDUM OPINION AND ORDER

(Adopted: January 3, 1977; Released: January 4, 1977)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS DISSENTING; COMMISSIONERS FOGARTY AND WHITE NOT PARTICIPATING.

1. We have before us a petition for reconsideration of that part of our decision in *Cowles Florida Broadcasting, Inc. (WESH-TV)*, 60 FCC 2d 372 (1976), denying the above-referenced modification application (File No. BPCT-4158), filed August 19, 1976 by Cowles Florida Broadcasting, Inc. (WESH-TV), hereinafter "Cowles". Also before us are: (a) oppositions to the petition for reconsideration, filed September 8, 1976, by Central Florida Enterprises, Inc. ("Central") and by the Chief, Broadcast Bureau; (b) Cowles' reply to oppositions, filed September 27, 1976; (c) Cowles' supplement to petition for reconsideration, filed November 29, 1976; (d) Central's motion to strike unauthorized pleading filed December 3, 1976; (e) Cowles' opposition to motion to strike unauthorized pleading, filed December 7, 1976; and (f) the Broadcast Bureau's comments on supplement to petition for reconsideration, filed December 8, 1976.

2. The background of the findings and conclusions respecting the engineering issues in this proceeding (including the applicants' arguments under those issues) is discussed thoroughly in pars. 27 to 42 of the decision, and will not be repeated here. For the same reason, we will not set out the lengthy discussion in pars. 43 to 51 of the decision wherein we concluded that Cowles should not be permitted to amend its modification application to reflect a proposed antenna height increase (par. 43) and that Judge Naumowicz had not erred in denying Cowles' modification application. We believe the reasons for denying Cowles' modification application

were sound, and to the extent Cowles merely reiterates arguments which have already been rejected, such arguments will not be considered. Reconsideration will not be granted to permit reargument of matters which have already been considered and resolved. *WWIZ, Inc.*, 37 FCC 685 (1964).

3. Cowles claims two new circumstances justify reconsideration. The first of these is the issuance of our *Report and Order* amending the rules to establish a new methodology for calculating field strength curves. 53 FCC 2d 855 (1975). The *Report and Order* was issued after oral argument herein, and Cowles argues this changed circumstance warrants reconsideration. Cowles also cites the Review Board's decision in *KTVO, Inc.*, 57 FCC 2d 260 (1975), in which the Board stated that, in its opinion, the *Report and Order* indicates the new propagation curves are an improved allocations tool to be used in all proceedings not yet finally determined.

4. Cowles claims that by applying the new field strength curves, WESH-TV's city-grade service contours would be substantially changed. Under the old methodology, we found WESH-TV did not serve 6% of Daytona Beach with city-grade service. (Decision, par. 48.) Cowles contends that when the new field strength curves are used, contours in general shrink, with the result that WESH-TV's city-grade contour fails to cover 22% of Daytona Beach. Cowles then argues it can no longer be assumed that the lack of coverage is "only minimal," as we concluded in our decision.

5. The adoption of new field strength curves does not justify reconsideration for several reasons. Cowles itself concedes it did not raise the city-grade service argument at the beginning of the proceeding, a point noted in our decision. Nor does the subsequent issuance of the *Report and Order* change this, because if Cowles believed its present arguments had merit, these arguments should have been raised long ago. The *Report and Order* was released on June 27,

1976, was published in the Federal Register on July 1, 1975 (40 Fed. Reg. 27671) and the amended rules became effective August 1, 1975. Moreover, we specifically pointed out in the *Report and Order* that we did not think the preparation of revised television contour maps would be particularly onerous (53 FCC 2d at 863-4), a judgment which appears to be confirmed by this case.¹ Cowles' limp explanation for its untimeliness (i.e., its speculation that the Broadcast Bureau and Central would have objected to employing the new curves on the ground it was too late to raise this matter) is totally unpersuasive. If it was too late then, it is certainly much too late now to raise this argument after the final decision.² *Valley Telecasting Co. v. FCC*, 336 F.2d 914 (1964). Finally, we note Central has timely sought judicial review of our decision. We agree with Central that if we were to grant Cowles' modification at this late stage, this would give Cowles an unjustified comparative advantage.

6. The second ground which is said to justify reconsideration is the alleged existence of skywave or co-channel interference to WESH-TV's signal. In our view, no extended discussion of this ground is necessary, because Cowles itself concedes "this problem was not brought out at hearing because the designated issues, as framed, did not cover it." Cowles argues that improvements in the signals of competing Orlando stations have high-lighted the defects in WESH-

¹Our decision was released July 20, 1976, and Cowles' present petition was filed August 19, 1976. While the supporting engineering affidavit annexed to the petition for reconsideration is not dated, the affidavit of the engineer who prepared this data (including contour maps prepared under the new curves) is dated August 12, 1976. It thus appears Cowles was able to assemble the data it now offers in less than thirty days.

²Regardless of what the new curves may show, those curves are inapplicable here because we specifically stated in the *Report and Order* that contours determined under the old methodology were "grandfathered." 53 FCC 2d 862. And even if, as Cowles claims, an Orlando station provides better service to Daytona Beach than WESH-TV does, this is totally irrelevant, because this argument is completely outside the designated issues.

TV's signal and make such defect appear "relatively" worse. It is apparent to us that such interference is not of recent origin, because to become relatively "worse," some degree of interference must have existed at the outset. But Cowles offers no explanation of why, if it considered this matter serious and one beyond the designated issues, it did not seek enlargement of the issues earlier, rather than waiting until after the final decision was released to raise it. We agree with Central and the Bureau that Cowles' attempt to raise this issue now comes far too late and does not serve as a basis for reconsideration. An applicant cannot wait until a final decision is issued and then seek to interject issues which would have been raised at an earlier stage of the proceedings. *Valley Telecasting Co., supra*.³

7. On our own motion, we next consider two additional matters which in our judgment require clarification: (1) the meaning to be placed on the Commission's use of the word "superior" in describing Cowle's past programming, and (2) the weight to be accorded the preference awarded Central under the diversification factor.

8. With respect to past programming, we stated that the performance of WESH-TV was "superior" and thus entitled to "a plus of major significance" within the meaning of *Citi-zens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971). We are now concerned that use of the term "superior" without elucidation may have conveyed a meaning other than that intended.

9. Our use of this term was meant to indicate that the level of service provided by WESH-TV was sound, favorable and substantially above a level of mediocre service which might

³Our judgment is not altered by the support which one of the two time-share licensees of Channel 2, Miami, Florida has given to Cowles' application to change transmitter site. (Cowles' supplement to petition for reconsideration.) Any lessening of short-spacing which would result from the co-channel station's proposal to change transmitter site is outweighed by the considerations discussed herein and in our Decision.

just minimally warrant renewal. Our intent to apply the term "superior" to service which was solid and favorable (as opposed to service which is truly "exceptional" or of the highest possible level) was initially set forth more than five years ago.⁴ In order to avoid a possibility of confusion, however, we propose to use the term "substantial" hereafter to characterize the sort of performance evidenced by this record. In using the word "superior" we were, in effect, distinguishing between two situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to be renewed in the absence of competing applications, and the other where the licensee had done so in a solid, favorable fashion. As the Court suggested in *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1970) *cert. denied*, 403 U.S. 923 (1971), a renewal applicant with a "sound" or "favorable" record is entitled to special consideration in a comparative proceeding even though this record might not be so far above the average as to be "exceptional" in nature. We believe that such "legitimate renewal expectancies" are clearly "implicit in the structure of the Act." 143 U.S. App. D.C. at 396, 444 F.2d at 854.⁵

⁴*Further Notice of Inquiry in Docket 19154*, 31 FCC 2d 443, 444 and notes 1 and 2 (1971).

⁵There the Court stated that such expectancies:

are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security.

143 U.S. App. D.C. at 400, 444 F.2d at 858. The Court reaffirmed the concept of renewal expectancies in *Alianza Federal de Mercedes v. FCC*, — U.S. App. D.C. —, — and n. 9, 539 F.2d 732, 736 and n. 9 (1976). In the *Citizens* case, the Court recognized that the absence of legitimate renewal expectancies would pose a threat to the public interest, although it spoke in terms of a "superior" performance whereas the Court in *Greater Boston* referred to a "sound" or "favorable" record. *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. at 44, n. 35, 447 F.2d at 1213, n. 35.

10. Thus, our use of the term superior was not meant to convey the impression that our conclusion turned upon a finding that WESH-TV's past programming was exceptional when compared to other broadcast stations in its service area or elsewhere. We did not mean to use the word in this comparative sense.

11. We also believe it appropriate to revisit our discussion of the diversification factor. On that issue we found that Central was entitled to a "clear preference" over Cowles. Our use of the term "clear" was not intended to indicate any view on the issue of how much weight should attach to Central's preference. On that issue we concluded that a variety of factors reduced the significance of the preference. Foremost among them was our finding that Cowles had no ownership interest in any other mass media outlet in Daytona Beach, or the remainder of WESH-TV's service area. Cowles' other broadcast and newspaper interests proved to be remote from Daytona Beach and were shown not to dominate in even those markets. Elsewhere our decision noted that Cowles had accorded WESH-TV's local management team substantial autonomy in its operations. While our decision did not discuss the impact of this local autonomy upon diversification we wish to make it clear now that this factor did serve to further diminish the preference accorded Central. *Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. 225, 242-3 and 246, 515 F.2d 684, 701-2 and 705 (1975).

12. For these reasons, we specifically rejected Central's contention that its preference on the diversification issue was "compelling." We went on to state that Central's preference on this issue was out-weighted by Cowles' distinct preference on the factor of best practicable service to the public. We did not, however, specifically articulate the weight to which Central's diversification preference was entitled. We believe that it would serve the public interest for us to do so here.

13. In our view the nature and management of Cowles' other mass media interests, and most especially their remoteness from Daytona Beach, is such as to have no adverse effect upon the flow of information to those persons in WESH-TV's service area. We can find no evidence in the record that the dangers of concentration, which we have characterized as any national or other uniform expression of political, economic, or social opinion, exist in this case. Accordingly, we find the preference awarded Central on diversification to be of little decisional significance.⁶

14. This conclusion fully squares with both judicial and agency precedent. In *Fidelity Television, Inc. v. FCC, supra*, the Court of Appeals for the District of Columbia Circuit affirmed our decision to renew the license of a Los Angeles television station whose parent owned mass media outlets in other parts of the country, as in the case before us, but also held other broadcast licenses in the Los Angeles area. In so doing the Court left undisturbed our conclusion that even in view of the more significant degree of concentration present in that case, there was no adverse effect upon the flow of information to the audience served by the incumbent licensee. Clearly the Court's decision in *Fidelity* dictates no different result under the circumstances present here.

15. Similarly there is no evidence contained in the record which would dictate a different result under Commission policy. We have consistently stated that it is not our policy to restructure the broadcast industry through the diversification criteria employed in comparative hearings. In the context where we found consideration of such restructuring appro-

⁶We also recognized that Black ownership increased Central's advantage under this and the integration of ownership and management criteria. However, as we later discussed, that ownership was relatively small and therefore of diminished importance. In other words, while Central's Black ownership and lack of other media interests was to be accorded some weight, it did not outweigh Cowles' distinct preference under the best practicable service criteria.

priate—a formal rulemaking—we determined that even in those cases where daily newspapers and broadcast stations in the same market were commonly owned, divestiture was unwarranted except in a specified number of egregious cases. *Second Report & Order in Docket 18110*, 50 FCC 2d 1046, 1078–1086 (1975), *appeal pending sub nom.*, *National Citizens Committee for Broadcasting v. FCC*, D.C. Cir. No. 75–1064.

16. Finally, the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), which does discuss the weighting of various factors under diversification, was intended only to govern applications for new facilities and did not purport to deal with the problems present where, as here, an applicant was seeking a license which was the subject of a renewal proceeding.⁷ Even if the *Policy Statement* did apply, our reasoning here would stand. In that document we said that we would consider other mass media interests of an applicant against the following schedule:

Other interests in the principal community proposed to be served will normally be of most significance, followed by other media interests in the remainder of the proposed service area and finally, generally in the United States, 1 FCC 2d at 394–5 (1965).

17. As we have made clear, Cowles' other media interests all fall within the third category—"generally in the United States"—which is entitled to least significance. Given this fact and the nature and location of the interests here in question, our finding that Cowles' other media holdings were of little decisional significance in this case was entirely proper.

⁷We have held, however, that the *Policy Statement* governs the introduction of evidence in a renewal proceeding. *Seven(7) League Productions, Inc.*, 1 FCC2d 1597, 1598 9 (1965), *cited in Fidelity Television, Inc. v. FCC*, *supra*, 169 U.S. App. D.C. at 240, n. 27, 515 F.2d at 699, n. 27. The *Policy Statement* did not address the weight to be accorded the legitimate renewal expectancies of the incumbent licensee, or for that matter, the relative significance of other comparative considerations.

18. Our conclusions in this regard do not mean—or suggest—that a challenger is denied an opportunity to show that a grant of his application will better serve the public interest. They do mean that a challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent. The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i.e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.

19. Accordingly, **IT IS ORDERED**, That the petition for reconsideration, filed August 19, 1976 by Cowles Florida Broadcasting, Inc. (WESH-TV), **IS DENIED**.

20. **IT IS FURTHER ORDERED**, That the motion to strike unauthorized pleading, filed December 3, 1976 by Central Florida Enterprises, Inc., **IS DENIED**.

21. And, **IT IS FURTHER ORDERED**, That our decision styled *Cowles Florida Broadcasting, Inc. (WESH-TV)*, 60 FCC 2d 372 (1976), is clarified to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, Secretary.

**CONCURRING STATEMENT OF
CHAIRMAN RICHARD E. WILEY IN
DOCKET NOS. 19168, 19169 and 19170**

The standard by which a renewal applicant's performance is to be judged, in order to "reasonably expect renewal" in the context of a comparative hearing, has not been altogether clear. In its original opinion, the majority adopted the requirement of "superior service" as set forth in dictum in *Citizens Communications Center v. FCC*.¹ I dissented to this determination on the ground that WESH-TV's service, while "thoroughly adequate" so as to justify renewal under any rational renewal system, was simply not "superior". On reconsideration, the majority now articulates the required standard of service as "solid and favorable" (as opposed to superior in terms of exceptional or of the highest possible level). This standard, as the majority points out, is consistent with expressions of the Court of Appeals in *Greater Boston Television Corp. v. FCC*.²

As indicated, I did not—and do not now—find Cowles' service to be superior (in the sense of exceptional). However, I did—and do now—find that service to be sufficiently substantial (in the sense of solid and favorable) to warrant renewal. Accordingly, given the majority's clarification of intent, I find myself able to concur in this matter.

However, it has been clear to me for a long time that this entire area demands Congressional action. As I have stated many times before, I do not believe that the present comparative renewal process makes sense. Accordingly, I and my fellow Commissioners have recommended to Congress that it be abolished.³ In the continuing absence of such legis-

¹145 U.S. App. D.C. 32, 44 & n. 35, 447 F.2d 1201, 1213 & n. 35 (1971).

²There, the court opined that the "renewal expectancies inherent in the structure of the Act" possibly would have been interfered with if the Commission had concluded that a licensee were to receive a "predicate for renewal" only upon a finding that its past record had been "exceptional" rather than "sound or 'favorable'" 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1970).

³*Report of the Federal Communications Commission to the Congress of the United States Re the Comparative Renewal Process (1976).*

lation, however, I believe that the time has come for the FCC to issue a new policy statement which will provide interim clarification (within the limitations of our authority). Hopefully, such a statement will provide some guidance in this complex and difficult area to licensees, challengers, Administrative Law Judges and, most importantly, the public at large.

FCC 77-446
70507

In re Applications of

COWLES B/CASTING, INC.
(WESH-TV)

Docket No. 19168
File No. BRCT-354

For Renewal of License

COWLES B/CASTING, INC.
(WESH-TV) Daytona Beach,
Florida

Docket No. 19169
File No. BPCT-4158

For Modification of Authorized
Facilities

**CENTRAL FLORIDA
ENTERPRISES, INC.**
Daytona Beach, Florida

Docket No. 19170
File No. BPCT-4346

For Construction Permit

Adopted: June 24, 1977

Released: June 30, 1977

[¶ 10:405] *Who may seek reconsideration; standing.*

Non-profit organizations which alleged that they had had a substantial interest in the Commission's policies dealing with both comparative and noncomparative renewal situations did not have standing to seek reconsideration of a decision granting a renewal application wherein the Commission had enunciated new comparative standards to be applied. The groups had not been parties to the renewal proceeding, and their attempt to intervene in the proceedings after the grant of the application had come far too late. However, the Commission would consider the merits of the groups' objections to the

grant since policies of general applicability to renewal applicants had been announced therein. *Cowles B/casting, Inc.*, 40 RR 2d 1627 [1977].

[¶ 53:24(V)] *Diversification of ownership.*

The contention that the Commission's treatment of "autonomy" and "remoteness" as they bear on the diversification factor has skewed the diversification criterion and undermined the Commission's multiple ownership rules and the policy of fostering Black ownership of stations is rejected. Even in contexts other than a comparative renewal proceeding, "remoteness" and "autonomy" still remain relevant, and, in each proceeding, the weight to be accorded those factors under the diversification criteria would depend on the particular facts involved. Assigning the proper weight to the diversification criterion in factually variable contexts does not undermine the importance of diversification; rather this weighing process merely underscores the fact that the decisional significance of the diversification factor necessarily varies with the facts. *Cowles B/casting, Inc.*, 40 RR 2d 1627 [1977].

MEMORANDUM OPINION AND ORDER

By the Commission:

(Chairman Wiley concurring and issuing a statement; Commissioner Hooks dissenting; Commissioners Fogarty and White not participating).

1. By Memorandum Opinion and Order, FCC 77-1, released January 4, 1977 [39 RR 2d 541], we denied the petition of Cowles Broadcasting, Inc. (Cowles) for partial reconsideration of our Decision in *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372 [37 RR 2d 1487] (1976). At that time, we also clarified, *sua sponte*, (a) the meaning to be placed on our use of the word "superior" in describing Cowles'

past programming, and (b) the weight to be accorded the preference awarded Central Florida Enterprises, Inc. (Central) under the diversification factor. Now before us are a petition for reconsideration of that Memorandum Opinion and Order, filed February 3, 1977, by the Citizens Communications Center (Citizens), National Black Media Coalition (NBMC), and National Citizens Committee for Broadcasting (NCCB), and the responsive pleadings listed below.¹

2. We consider first petitioners' standing to seek reconsideration. Petitioners are not parties to these proceedings and evidenced no interest therein until the release of our clarifying Memorandum Opinion and Order, *supra*, hereinafter referred to as FCC 77-1. In support of their right to seek reconsideration, petitioners state that they are non-profit organizations with a substantial interest in the Commission's policies both in comparative and noncomparative renewal situations. Additionally, NBMC contends it is interested in promoting the entry of Blacks into broadcasting, and NCCB is interested in assuring FCC policies which will promote maximum feasible diversification of mass media ownership. While Citizens takes no position on whether the grant of Cowles' renewal application should stand,² it contends the new general policy embodied in FCC 77-1 will undermine the efficacy of our comparative renewal processes, our multiple ownership policies, our minority ownership policies, and our standards for integration of management and ownership.

¹Comments of Central Florida Enterprises, Inc., filed February 16, 1977; motion to strike, filed February 16, 1977, by Chief, Broadcast Bureau; petitioners' response to motion to strike and Central's comments, filed March 1, 1977; petition for late acceptance and opposition to petition for reconsideration, filed March 2, 1977, by Cowles Broadcasting, Inc.; Cowles' comments on response of petitioners, filed March 9, 1977; and petitioners' reply to opposition to petition for reconsideration, filed March 11, 1977.

²NBMC and NCCB do not make a similar representation.

3. All three parties to these proceedings—Cowles, Central and the Broadcast Bureau—oppose petitioners' efforts to intervene at this late stage. They refer, *inter alia*, to the tardiness of the petition, the vagueness of petitioners' claims they will be aggrieved by a denial of intervention, and the discretionary nature of granting intervention rights to non-parties. In its comments, Central suggests the petition be considered as an informal complaint. The Broadcast Bureau considers the petition so defective that it has filed a motion to strike that pleading.³

4. In our judgment, petitioners do not have standing to intervene in these proceedings, and their efforts to do so come far too late. *Valley Telecasting Co. v. FCC*, 118 U.S. App. D.C. 410, 336 F.2d 914 [2 RR 2d 2064] (1964). Nevertheless, we will consider the merits of petitioners' objections to FCC 77-1. We do so because we recognize that in FCC 77-1 we did announce policies of general applicability to comparative renewal proceedings. See our reference to FCC 77-1 in Pa. 24 of the recently adopted *Report and Order* in Docket 19154, FCC 77-204, released April 7, 1977 [40 RR 2d 763].

5. In our judgment, developments occurring after the filing of the pleadings herein have rendered petitioners' first argument substantially moot. In their first argument, petitioners complain that our treatment in FCC 77-1 of an incumbent's past broadcast record is confused and subjective. The argument here rests on the fact that in our original Decision (60 FCC 2d 372), a majority of the Commission concluded Cowles' past broadcast record was "superior", but in clarifying what we meant by "superior" in FCC 77-1, the Commission substituted an applicable standard of "substantial", by which we meant that WESH-TV's past record was

³The Broadcast Bureau's motion to strike will be denied. In that motion, the Bureau requests that it be permitted an opportunity to comment on the merits of the petition in the event its motion is denied. That request will also be denied.

“...sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.” (FCC 77-1, Par. 9). The concerns that prompted this clarification are fully explained in Pars. 8-10 of FCC 77-1, and our clarification was intended to dispel any notion that only service which was “...truly ‘exceptional’ or of the highest possible level” (FCC 77-1, Par. 9) entitled an incumbent to renewal against the challenge of a newcomer.

6. After professing to find much confusion in this approach and after conceding they have “...no real quarrel with the Commission’s use of ‘substantial’ as the [applicable] test”, petitioners then offer what they perceive as a solution to the standards under which an incumbent’s past broadcast record should be judged. Petitioners argue a key factor in deciding whether an incumbent’s past record is sufficiently substantial to justify renewal is the percentage of time an incumbent devotes to serving as a local outlet and to contributing to an informed electorate. Then, taking note of the then-pending rule making in Docket 19154, they argue the only proper course for the Commission to follow is to adopt “...percentage guidelines for measuring a licensee’s past meritorious service.” (Petition, p. 8). This, in petitioners’ view, is the only “...sensible, objective or lawful course open to the Commission” in view of the critical nature of an incumbent’s past record (of which programming is the essence), the alleged undesirability of taking quantitative percentages into account on an ad hoc basis, and the desirability—given First Amendment considerations—of examining a past record under objective standards. (*Petition*, pp. 8-10). Petitioners then urge that the rule making in Docket 19154 be completed, and that this case be reconsidered by the standards enunciated therein.

7. In the *Report and Order* in Docket 19154 (released after petitioners filed their pleadings) we discussed at length the pros and cons of adopting quantitative standards for

establishing what constitutes "substantial program service" by a broadcast renewal applicant involved in a comparative hearing. After considering testimony and extensive comments in the proceeding, we concluded after careful analysis that such stancards constituted "...a simplistic, superficial approach to a complex problem",⁴ and their adoption would not serve the public interest.

8. We agree with Central and Cowles that petitioners' attempt to use this proceeding as a means of concluding the rule making in Docket 19154 is entirely unwarranted. The development of standards which are fair to both an incumbent licensee and a challenger in a renewal/new applicant proceeding is a difficult task, as even petitioners agree. But for the reasons stated in the *Report and Order* in Docket 19154, we have determined that such renewal proceedings will continue to be decided on an ad hoc basis, until such time as the Congress acts on our legislative recommendation that comparative renewal hearings be eliminated. In this connection, we note NBMC and NCCB participated in the rule making, and Citizens played the key role in obtaining reversal of the Commission's *1970 Comparative Renewal Policy Statement*, 22 FCC 2d 424 [18 RR 2d 1901] (1970). Any continuing concern which petitioners might have in the matter of adopting quantitative standards should be confined to review proceedings which might be undertaken with respect to Docket 19154. In short, the termination of the rule making in Docket 19154 gives the petitioners as much as they are entitled to seek—a decision on the merits of the proposal to adopt quantitative standards.⁵ But irrespective of whether they agree with that decision, that extraneous matter should not be interjected into this comparative case, which has already, as Central plaintively notes, gone on too long.

⁴Par. 21, *Report and Order*, FCC 77-204, released April 7, 1977. Commissioners Hooks and Fogarty issuing a separate statement, Commissioner Quello concurring and issuing a separate statement.

⁵Our refusal to adopt quantitative standards in Docket 19154 renders moot petitioners' request that this case be reconsidered under such standards.

9. In their second argument, petitioners contend that in FCC 77-1, we adopted and elevated erroneous concepts of "remoteness" and "autonomy" in our treatment of the diversification factor. In revisiting the diversification factor in FCC 77-1, we explained in detail why, in the particular circumstances of this case, the preference awarded Central on diversification was of little decisional significance. See Pars. 11 to 17, FCC 77-1. We see no point in repeating that discussion at length here, beyond noting that our treatment of the diversification factor was specifically based on both judicial and agency precedent

10. In our judgment, the contentions which petitioners make in their second argument are either erroneous because they ignore applicable precedent, or are based on speculation involving fact situations not present here. For example, while petitioners first contend our holding respecting autonomy has no support in logic, precedent, or the statutory scheme, they recognize (*Petition*, Fn. 11) that in FCC 77-1, we relied on *Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. 225, 242-3 and 246, 515 F.2d 684, 701-2 and 705 [34 RR 2d 419] (1975). That case specifically supports our treatment of the "autonomy" and "remoteness" factors under the diversification criterion, and thus does provide precedential support. We think petitioners' real quarrel is not so much with our decision as it is with the Fidelity case, because petitioners—one of whom (Citizens) filed as *amicus curiae* in support of rehearing or clarification in the Fidelity case—candidly admit they "...think the court was mistaken in Fidelity even in the 1973 context." But petitioners' disagreement with the Fidelity case does not render our reliance thereon erroneous.

11. Petitioners further claim our treatment of "autonomy" and "remoteness" has skewed the diversification criterion and undermined our multiple ownership rules and the policy

of fostering Black ownership of stations. We cannot agree with this contention. To begin with, our treatment of the concepts of "remoteness" and "autonomy" as they bore on the diversification factor occurred in the context of a comparative renewal proceeding. For the reasons stated in FCC 77-1, we believe that treatment is correct. Thus, petitioners indulge in unwarranted speculation when they argue FCC 77-1 threatens to undermine the diversification policy in other contexts. However, even in contexts other than a comparative renewal proceeding, "remoteness" and "autonomy" still remain relevant, and in each case, the weight to be accorded these factors under the diversification factor would depend on the particular facts involved. See Pars. 16 and 17, FCC 77-1. But assigning the proper weight to the diversification criterion in factually variable contexts does not "undermine" the importance of diversification, as petitioners erroneously contend. Rather, this weighing process merely underscores the fact that the decisional significance of the diversification factor necessarily varies with the facts.

12. Accordingly, it is ordered, that the petition for reconsideration, filed February 3, 1977, by Citizens Communications Center, National Black Media Coalition, and National Citizens Committee for Broadcasting is denied.

13. It is further ordered, that the petition for late acceptance, filed March 2, 1977, by Cowles Broadcasting, Inc. is granted.

14. It is further ordered, that the motion to strike the petition for reconsideration, filed February 16, 1977, by Chief, Broadcast Bureau is denied.

CONCURRING STATEMENT OF CHAIRMAN RICHARD E. WILEY

This case has proved to be one of the most difficult I have had to decide in my years on the Commission. And, in truth, the call remains an exceedingly close one. As the record will show, my first vote was to dissent on the ground that "a grant of renewal would be inconsistent with the law as I understand it." By this, I meant that renewal could not be justified under the standard which the majority apparently had employed.¹ In this same opinion, however, I also expressed the view that—under a proper renewal policy—Cowles should not be denied its license.

In its opinion on reconsideration, the Commission majority articulated and applied a comparative renewal standard with which I strongly agree, and one under which I believe that the renewal of Cowles' license can be fully justified.² Accordingly, I concurred in the result reached in that opinion. I continue to believe, however, that serious difficulties are involved in any attempt to compare an incumbent licensee with a challenger. For this reason, I advocate the abolition of the entire comparative renewal process—a reform which the Commission previously has recommended to Congress.³

¹Under this standard, credit could be given for an incumbent's past performance only in cases of "superior service." See *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 44 and n. 35, 447 F.2d 1201, 1213 and n. 35 [22 RR 2d 2001] (1971).

²Under this standard, a preference could be awarded for "substantial" past performance. As the majority pointed out, this formulation was consistent with the court's statement in *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 [20 RR 2d 2053] (1970).

³Report of the Federal Communications Commission to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce (of the House of Representatives) Re the Comparative Renewal Process, September 20, 1976.

CENTRAL FLORIDA ENTERPRISES, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.
Cowles Broadcasting, Inc., Intervenor.
No. 76-1742
United States Court of Appeals,
District of Columbia Circuit.
Argued 6 June 1978.
Decided 25 Sept. 1978.
As Amended on Denial of Rehearing and
Rehearing En Banc 12 Jan. 1979.
Certiorari Dismissed May 17, 1979.
See 99 S.Ct. 2189.

Appeal was taken from an order of the Federal Communications Commission denying application for construction permit for new commercial television station and granting mutually exclusive application for renewal of license. The Court of Appeals, Wilkey, Circuit Judge, held that Commission acted unreasonably and without substantial record support in preferring renewal application.

Orders vacated and case remanded.

1. Telecommunications

Federal Communications Act precludes any preference with respect to issuance of commercial television broadcasting license based on incumbency per se. Communications Act of 1934, § 307(d), 47 U.S.C.A. § 307(d).

2. Telecommunications

Although not a precise concept, renewal expectancies of a commercial television station licensee derived from "meritorious service" are a natural aspect of the public interest inquiry in a comparative licensing hearing; moreover, weighing of policies under public interest standard is task delegated

to the Federal Communications Commission in the first instance. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

3. Telecommunications

Function of Court of Appeals in reviewing a decision of the Federal Communications Commission granting commercial television broadcasting license is fairly limited; however, Court must be satisfied that Commission has given reasoned consideration to all material facts and issues, that its findings of fact are supported by substantial evidence and that if its notion of public interest changes at least it has not deviated from prior policy without sufficient explanation. Communications Act of 1934, § 402(b), 47 U.S.C.A. § 402(b).

4. Telecommunications

Federal Communications Commission acted unreasonably and without substantial record support in renewing commercial television broadcasting license and denying application for construction permit for new commercial television station where it found favorably to applicant on issues of diversification, integration and minority participation, found that incumbent licensee had violated Commission rule and renewed license on basis of wholly noncomparative assessment of incumbent's past performance as substantial. Communications Act of 1934, §§ 301, 304, 307(d), 309(e, h), 47 U.S.C.A. §§ 301, 304, 307(d), 309(e, h).

5. Telecommunications

Federal Communications Commission's finding at comparative renewal hearing that incumbent licensee moved main television studio in violation of Commission regulation was supported by substantial evidence, for purpose of determining whether license should be renewed.

6. Telecommunications

Choice of remedies and sanctions for violation of Federal Communications Commission rules is matter wherein Com-

mission has broad discretion and is free to consider mitigating factors but Commission is not free wholly to disregard violations of its rules.

7. Telecommunications

Although a showing of harm occasioned by licensee's violation of Federal Communications Commission rule governing moving of main television studio was relevant to severity of sanction imposed, failure to show injury did not excuse a plain violation, for purpose of determining whether broadcasting license should be renewed.

8. Telecommunications

Holder of television broadcasting license was chargeable with knowledge of main studio regulation of Federal Communications Commission.

9. Telecommunications

Mere absence of bad faith on part of licensee which violated main television studio regulation of Federal Communications Commission did not mitigate its violation, for purpose of determining if license should be renewed.

10. Telecommunications

Federal Communications Commission's finding at comparative renewal hearing that there was no connection between incumbent licensee and its subsidiaries which were guilty of mail fraud apart from common ownership was unsupportable, for purpose of determining whether commercial television broadcasting license should be renewed, in light of evidence that there were at least two persons who were principal officers both of licensee and each of the subsidiaries.

11. Telecommunications

Where Federal Communications Commission at comparative renewal hearing correctly found that applicant's advantage with respect to diversification criterion was a clear advantage because of its lack of other media interests as contrasted with those of incumbent licensee, it was unrea-

sonable for Commission to then accord diversification finding little decisional significance because of remoteness of incumbent licensee's other media interests in other states.

12. Telecommunications

Record produced at renewal comparative hearing and showing incumbent licensee's unexceptional but solid past performance did not support finding of Federal Communications Commission that incumbent licensee rather than applicant for new commercial television station would give best practicable service.

13. Telecommunications

Federal Communications Commission may not abandon prior established criteria for granting commercial television broadcasting license and renewal of license without providing alternative scheme affording thorough and intelligible comparison. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

14. Telecommunications

Performance that is merely average, whether solid or not, does not warrant renewal of television broadcasting license and is not of special relevance at comparative renewal hearing without a finding that challenger's performance would likely be no more satisfactory.

On Rehearing

15. Telecommunications

Place for a new rationale with respect to the renewal expectancies of commercial television station licensee in a comparative renewal proceeding before the Federal Communications Commission was on remand for decision setting aside renewal because FCC's manner of balancing its findings was wholly unintelligible; if FCC decided to accord weight to noncomparative values such as industry stability, it would have to do so in manner susceptible of judicial review.

Appeal from an Order of the Federal Communications Commission.

Joseph F. Hennessey, Washington, D.C., with whom Lee G. Lovett and Richard C. Rowleson, Washington, D.C., were on the brief, for appellant.

Daniel M. Armstrong, Associate Gen. Counsel, Washington, D.C., with whom Robert R. Bruce, Gen. Counsel and Jack David Smith, Counsel F.C.C., Washington, D.C., was on the brief, for appellee.

Robert A. Marmet, Washington, D.C., with whom Harold K. McCombs, Jr., Washington, D.C., was on the brief, for intervenor, Cowles Broadcasting, Inc.

Edward J. Kuhlmann, Washington, D.C., was on the brief for *amicus curiae* urging the Commission's decision to be reversed and remanded.

Before ROBINSON and WILKEY, Circuit Judges, and FLANNERY,* District Judge for the United States District Court for the District of Columbia.

Opinion for the Court filed by Circuit Judge WILKEY.

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

OUTLINE OF OPINION

- I. ISSUES IN COMPARATIVE RENEWAL PROCEEDINGS, PAST AND PRESENT**
- II. THE COURSE OF THE LITIGATION**
 - A. The Initial Decision**
 - 1. Designated Issues**
 - a. The Main Studio Move**
 - b. Mail Fraud**
 - 2. Standard Comparative Issues**
 - a. Diversification of Media Ownership**
 - b. Best Practicable Service**
 - (1) Integration of Ownership and Management**
 - (2) Cowles' Past Service**
 - c. The Public Interest Finding on the Two Standard Comparative Issues**
 - B. The Commission Decision**
- III. ANALYSIS**
 - A. The Designated Issues**
 - 1. The Main Studio Move**
 - 2. The Mail Fraud Issue**
 - B. Standard Comparative Issues**
 - 1. Diversification**
 - 2. Best Practicable Service**
 - a. Integration**
 - b. Cowles' Past Performance**
- IV. CONCLUSION**

WILKEY, Circuit Judge:

Appellant, Central Florida Enterprises, Inc. (Central), appeals a decision and accompanying orders by the Federal Communications Commission (Commission) denying its application for a construction permit for a new commercial television station to operate on Channel 2 in Daytona Beach, Florida, and granting the mutually exclusive application for renewal of license to Intervenor Cowles Florida Broadcasting, Inc. (Cowles).¹ Appellant contends that the Commission acted unreasonably and without substantial record support in preferring Cowles' renewal application. We agree, vacate the Commission's orders, and remand for further proceedings.

I. ISSUES IN COMPARATIVE RENEWAL PROCEEDINGS, PAST AND PRESENT

What is at issue here is the validity of the process by which the competing applications of Central and Cowles were compared and the adequacy of the Commission's articulated rationale for its choosing to renew Cowles' license. This may well be a typical comparative renewal case, hence the careful scrutiny we give the Commission's procedure and rationale herein.

[1] Aside from the specific facts of this case, there is other evidence indicating the state of administrative practice in Commission comparative renewal proceedings is unsatisfactory.² Its paradoxical history reveals an ordinarily tacit

¹*Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372 (1976), *reconsideration denied and clarified*, 62 F.C.C.2d 953 (1977), *reconsideration denied*, 40 Rad.Reg.2d 1627 (1977) (P-H). The jurisdiction of this court is properly invoked pursuant to 47 U.S.C. § 402(b) (1970).

²*See generally Fidelity Television, Inc. v. FCC*, 169 U.S.App.D.C. 225, 246-58, 515 F.2d 684, 705-17 (Bazelon, C. J.) (voting to grant rehearing en banc), *cert. denied*, 423 U.S. 926, 96 S.Ct. 271, 46 L.Ed.2d 253 (1975); *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 37-41, 447 F.2d 1201, 1206-10 (1971), *clarification granted*, 149 U.S. App. D.C. 419, 463 F.2d 822 (1972); *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 435-42 (1976) (Commissioner Robinson, dissenting); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 Va.L.Rev. 471 (1975).

presumption that the incumbent licensee is to be preferred over competing applicants.³ Because the Federal Communications Act fairly precludes any preference based on incumbency *per se*,⁴ the practical bias arises from the Commission's discretionary weighing of legally relevant factors.⁵ Of course, the general preference, and *a fortiori* the disposition in any given instance, may be a lawful exercise of the Commission's "substantive discretion." However, it is the judicial function to insure that such discretionary choices as are entailed in these proceedings are rigorously governed by traditional principles of fairness and administrative regularity.

Comparative analysis is implicit in any scheme of allocation and has always been at least formally a consideration in

³See note 17 *infra*.

⁴The Communications Act of 1934 included language expressly referring the decision to renew a license to "the same considerations and practice which affect the granting of original applications," ch. 652, § 307(d), 48 Stat. 1084 (1934). Apparently to preclude the inference that an incumbent could not adduce evidence of its past broadcast record, Congress in 1952 deleted the language subjecting renewal applicants to "the same considerations and practice" as original applicants and substituted the present language subjecting all applications to the standard of "public interest, convenience, and necessity," 47 U.S.C. § 307(d) (1970). See *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. at 37-38 and n. 13, 447 F.2d at 1206-07 and n. 13. But see *Report of the Federal Communications Commission to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives Re the Comparative Renewal Process*, Joint Appendix (J.A.) at 172, 182 (1976) [hereinafter cited as *Report*] (suggesting that the 1952 amendment may have codified the Commission's informal presumption of renewal). The Communications Act contains numerous other passages suggesting that the grant of a license creates no preferential rights in the incumbent, providing, *inter alia*, that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license," 47 U.S.C. § 301; that an applicant waives any claim to a frequency "because of the previous use of the same," 47 U.S.C. § 304; that no license granted "shall be for a longer term than three years," 47 U.S.C. § 307(d); and that a license does "not vest in the licensee any right . . . in the use of the frequencies . . . beyond the term thereof," 47 U.S.C. § 309(h) (1970). See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 84 L.Ed. 869 (1940).

⁵See pp. _____ of 194 U.S. App. D.C., pp. 50, 51 of 598 F.2d *infra*.

broadcast licensing. The procedural setting for such a comparative review is the licensing hearing provided by Section 309(e) of the Communications Act.⁶ The Supreme Court held in *Ashbacker Radio Corp. v. FCC*⁷ that under Section 309(e) where two or more applications are mutually exclusive there must be a joint comparative hearing. This court had occasion to elaborate what is entailed by such a "full hearing" in *Greater Boston Television Corp. v. FCC*:

[T]he findings must cover all the substantial differences between the applicants and the ultimate conclusion must be based on a composite consideration of the findings as to each applicant.⁸

Although *Ashbacker* dealt with two original applications, this court and the Commission have consistently held that the doctrine governs renewal proceedings as well.⁹

A less tractable matter has been the question of the substantive criteria to assure a fair comparison. The development of those criteria has been committed largely to the discretion of the Commission, with occasional and quite general guidance from the courts, as in *Greater Boston, supra*. The standards, evolved gradually over the course of the Commission's comparative proceedings, were reviewed and restated in the *1965 Policy Statement on Comparative Broadcast Hearings*.¹⁰ Logically, criteria for comparison should be derived from and relate to the defined *objectives* of the comparative hearing. The Commission so proceeded, identifying in the Policy Statement the primary *objectives* of the comparative hearing as "the best practicable service to the public" and the "*maximum diffusion of control of the media of mass communication*."¹¹ The principal factors rele-

⁶47 U.S.C. § 309(e) (1970).

⁷326 U.S. 327, 333, 66 S.Ct. 148, 90 L.Ed. 108 (1945).

⁸143 U.S. App. D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971) (footnote omitted).

⁹See *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. at 42, 447 F.2d at 1211.

¹⁰1 F.C.C.2d 393 (1965) [hereinafter cited as *1965 Policy Statement*].

¹¹*Id.* at 394.

vant to the "best practicable service" issue were the extent of participation of owners in station management, programming proposals, past broadcast record, technical capacity, and character.¹² Diversification of ownership of the mass media was described as being "of primary significance."¹³ Further, upon an appropriate showing, the parties could raise any other relevant factors.

The applicability of the Commission's usual comparative criteria to comparative *renewal* proceedings has been uncertain. The fact of incumbency without more would appear legally irrelevant under the statute.¹⁴ Although the 1965 *Policy Statement* pretermitted "the somewhat different problems raised when an applicant is contesting with a licensee seeking renewal of license,"¹⁵ the Commission subsequently held that the 1965 *Policy Statement* "should govern the introduction of evidence in this and similar proceedings where a renewal application is contested."¹⁶ The weight given to the 1965 criteria would still depend on the facts of each case.

Despite the apparent statutory assurance of a freewheeling inquiry into the relative merit of challenger and incumbent licensee, the history of Commission practice reveals a strong preference for renewal.¹⁷ Further, until fairly recently, such choices by the commission were routinely affirmed by this court.¹⁸ This general phenomenon has been rationalized into what we have called on occasion "a renewal expectancy."¹⁹

¹²*Id.* at 395-98.

¹³*Id.* at 395.

¹⁴See note 4 *supra*.

¹⁵1965 *Policy Statement*, *supra* note 10, at 393 n.1.

¹⁶*Seven (7) League Productions, Inc. (WIII)*, 1 F.C.C.2d 1597, 1598 (1965).

¹⁷See *Citizens Communication Center v. FCC*, 145 U.S. App. D.C. at 38-40, 447 F.2d at 1207-09; *Wabash Valley Broadcasting Corp. (WTHI-TV)*, 35 F.C.C. 677 (1973); *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951).

¹⁸See *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. at 39 n. 23, 447 F.2d at 1208 n. 23.

¹⁹See *id.* 145 U.S. App. D.C. at 44 n.35, 447 F.2d at 1213 n.35; *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 396, 400, 444 F.2d at 854, 858.

The question arises, material in this case, to what extent such an expectancy is compatible with the full hearing guaranty of Section 309(e). This was essentially the question we confronted in *Citizens Communication Center v. FCC*.²⁰ There we struck down the Commission's 1970 *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*²¹ because it foreclosed the fully comparative inquiry mandated by the statute as construed in *Ashbacker*. Under that Policy Statement, if there were a showing of past "substantial service," a licensee would be renewed without consideration of comparative issues. *Citizens* thus stands for the proposition that "the Commission may not use renewal expectancies of incumbent licensees to shortcircuit the comparative hearing."²²

We did note the relevance of the incumbent's past performance:

We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. . . . At the same time, superior performance should be a plus of major significance in renewal proceedings. . . . The Court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.²³

[2] Despite the language in *Citizens*, it is fair to say that the law governing comparative renewal proceedings remained unclear. Although *Ashbacker* had said a challenger could not be denied a hearing and *Citizens* apparently assured some kind of substantive comparison, the nature of the inquiry and the pertinence of "renewal expectancies" was left uncertain.

²⁰145 U.S. App. D.C. 32, 447 F.2d 1201 (1971).

²¹22 F.C.C.2d 424 (1970).

²²*Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. at 246, 515 F.2d at 705, 709 (Bazelon, C. J.) (voting for rehearing en banc).

²³*Citizens Communication Center v. FCC*, 145 U.S. App. D.C. at 44 and n.35, 447 F.2d at 1213 and n.35.

As an original matter, of course, a "renewal expectancy" could be shorthand for any of several plausible theories of the public interest standard contained in section 309. For example, expectations *could* be confined to the likelihood that an incumbent would prevail under the customary 1965 criteria without any special regard for the quality of its past performance one way or the other. It would hardly be sensible, however, to ignore the past, for it affords the "best evidence" of what the incumbent's future performance will be, and it has never been the Commission's practice to do so. Conceding therefore, that an incumbent's past performance is highly relevant, an incumbent with a meritorious record would possess a natural advantage insofar as its actual performance made its proposals more credible than the "paper promises" of a challenger. Some such comparative assessment of *likely* performances would, in fact, seem inescapable. It would then follow naturally from discounting the promises of challengers that incumbents would prevail more often, thereby assuring more "continuity" in the industry. The certainty thus afforded a meritorious incumbent through its natural comparative advantage may in turn induce it to commit enough resources to perpetuate its quality of service. An expectation raised by the probability of prevailing in the overall inquiry is, of course, fully compatible with the comparison assured by section 309.

We understand the Commission's present idea of renewal expectancies may be more expansive—that an "expectancy" may be generated by something less than or different from more meritorious service. An incumbent is said entitled to expect renewal if it has "served the public interest in . . . a substantial manner." Apparently, a "substantial" past record would be a factor weighed in the incumbent's favor *irrespective* of which applicant were predicted to perform better in the future. Such an entitlement would be provided to

promote security directly and to induce investment which otherwise may not be made. Whether and in what manner placing such a thumb on the balance in an otherwise comparative inquiry may be reasonable are, we think, open and difficult questions.

In a number of cases before and after *Citizens* this court has had occasion to refer to renewal expectancies without much inquiry into the notion's content. Thus, in dictum in *Greater Boston Television Corp. v. FCC*, we observed there were "legitimate renewal expectancies implicit in the structure of the Act." We said that "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest."²⁴ In 1975, in our *Fidelity Television* opinion, confronted with a weak licensee and a weak contender, both only "minimally acceptable applicants," we said "when faced with a fairly and evenly balanced record, the Commission may on the basis of the renewal applicant's past performance, award him the license."²⁵

Finally, last term the Supreme Court observed, in the context of reviewing the FCC's regulations barring certain newspaper-broadcast combinations, that industry stability has consistently been a concern in comparative renewal proceedings. It said:

In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized

²⁴143 U.S. App. D.C. at 396, 444 F.2d at 854.

²⁵169 U.S. App. D.C. at 243, 515 F.2d at 702.

that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause. *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 854 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); see *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 44 and n. 35, 447 F.2d 1201, 1213 and n. 35 (1971); *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, [66 F.C.C.2d at 420].²⁶

Thus, although not a precise concept, renewal expectancies derived from "meritorious service" (to use the Supreme Court's terminology) are a natural aspect of the public interest inquiry carried on under section 309(e). Moreover, "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance."²⁷

II. THE COURSE OF THE LITIGATION

Intervenor Cowles has operated its station, WESH-TV, on Channel 2 in Daytona Beach since it purchased the station in 1966. On 31 October 1969 Cowles filed its application for renewal of license. Central submitted its competing application for a construction permit for a new television station to operate on the same channel on 2 January 1970. The two applications were set for hearing by Commission order released 10 March 1971, and redesignated by orders released 20 August 1971 and 24 February 1972.

In addition to inquiry into diversification of media ownership and "best practicable service," which comprise the customary comparative issues, certain special issues were desig-

²⁶*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805-806, 98 S.Ct. 2096, 2117-2118, 56 L.Ed.2d 697 (1978) (footnotes omitted).

²⁷*Id.* at 810, 98 S.Ct. at 2120.

nated for hearing. These were (a) whether contrary to Commission regulation, Cowles had moved its main studio without prior Commission approval; and (b) whether alleged mail fraud by five related corporations supported inferences adverse to Cowles' character.²⁸ Following extensive findings, the Administrative Law Judge (ALJ) concluded that renewal of Cowles' license would best serve the public interest.²⁹ By a 4-3 vote the Commission affirmed with certain modifications.³⁰

The facts in this case are essentially undisputed, and will be recounted only incidentally to our review of the Commission's decision.

B. The Initial Decision

1. Designated Issues.

a. *The Main Studio Move*

Commission rules require that "[t]he main studio of a television broadcast station shall be located in the principal community to be served."³¹ WESH-TV's city of assignment is Daytona Beach, and the station had always had a studio just outside the city at Holly Hill. In addition, WESH-TV maintained "auxiliary" studios in Winter Park, just outside Orlando. Since 1960, the station had been authorized to identify as a Daytona Beach-Orlando station, although the Commission stressed that Daytona remained the city of assignment and "principal city." The rule prescribing the location of the "main" studio, unlike the analogous rules governing radio stations,³² contains no definition of "main" studio and there is little clarifying precedent.

²⁸Certain other designated issues, dealing with engineering and financial matters, are not at issue here.

²⁹*Cowles Florida Broadcasting, Inc.* F.C.C. D-62 (Released 7 Dec. 1973) [hereinafter cited as *Initial Decision*], J.A. at 78.

³⁰See note 1 *supra*.

³¹47 C.F.R. 73.613 (1977).

³²47 C.F.R. 73-210 (1977) (FM stations); 47 C.F.R. 73.30 (1977) (AM stations).

Still, the ALJ found "inescapably" that "Cowles treats its Winter Park [Orlando] facility as its principal place of business."³³ Because there had been an unauthorized move of the "main studio" contrary to rule, the ALJ gave Cowles a comparative demerit.³⁴ However, the demerit was not given much weight in light of what the ALJ considered to be mitigating factors. First, the ALJ stressed that there was "little evidence that the move resulted from a deliberate corporate decision to move the main studio in defiance of the Commission's rules." Rather, a "series of changes" responding to the "commercial lure" of Orlando, resulted in a "de facto move of the main studio."³⁵ Second, the ALJ concluded that "the unauthorized move had not resulted in the downgrading of service to the community of assignment which [the rule] is designed to prevent."³⁶

b. Mail Fraud

Cowles is a wholly owned subsidiary of Cowles Communications, Inc., (CCI). During the license period CCI also published Look Magazine and owned five other subsidiaries, each in the business of obtaining magazine subscriptions. The five subsidiaries conducted so-called "paid during service" (PDS) operations in which subscribers paid installments of the purchase price over the life of the subscription.

After a few years, complaints arose of improper sales and collection practices by the PDS companies. When CCI became aware of the problem, it promulgated a code of practice for the subsidiaries to cure the abuses. Despite these efforts, the practices continued and by the fall of 1969 the PDS companies were under investigation by various state and federal agencies. In 1970, after being informed that the Justice Department intended to investigate the entire PDS industry,

³³*Initial Decision* ¶ 181, J.A. at 130.

³⁴*Id.* ¶ 203, J.A. at 136.

³⁵*Id.* ¶ 182, J.A. at 131.

³⁶*Id.* ¶ 183, J.A. at 131.

CCI initiated negotiations which resulted in *nolo contendere* pleas by the five PDS subsidiaries to fifty counts of mail fraud, and a consent decree against the five companies, guaranteed by CCI, enjoining specific sales and collection practices.

With respect to Cowles' parent, CCI, the ALJ reached conclusions that he characterized as "harsh."³⁷ He found that CCI acquired operations which "it must have realized" would be inclined to massive fraud. CCI's supervision was "spotty" and "ineffectual," its internal investigation coming "late in the day" when it recognized "that various governmental agencies were about to call it to account." It was "inconceivable that it would have. . . been unaware" of such corruption "unless it chose to be."³⁸

The ALJ concluded, however, that Cowles was insulated from these "harsh" findings concerning its parent. Although the ALJ supposed such evidence of fraud would probably disqualify an original applicant, the findings in this case were not "decisionally material" in light of Cowles' broadcast record which better predicts future performance. Consequently, it was "unnecessary to attempt to draw inferences from the nonbroadcast conduct of CCI and its nonbroadcast subsidiaries;" and "no conclusions adverse to the character qualifications of [Cowles] should be reached on the basis of that issue."³⁹

On the two specially designated issues, the main studio move and the mail fraud inquiry, by the ALJ's reasoning Cowles escaped unscathed.

2. Standard Comparative Issues.

a. Diversification of Media Ownership

The ALJ concluded that "the advantage lies with Central" under the diversification factor because it had "no connection of any sort with any other mass media outlet."⁴⁰ Cowles'

³⁷*Id.* ¶ 185, J.A. at 132.

³⁸*Id.* ¶ 184, J.A. at 131-32.

³⁹*Id.* ¶ 186, J.A. at 132.

⁴⁰*Id.* ¶ 193, J.A. at 133-34.

parent, CCI, owned an AM-FM-TV combination in Des Moines, Iowa, and another CCI subsidiary owned AM and FM radio stations in Memphis, Tennessee. While these interests were "remote" from Daytona Beach, the ALJ held that they remained a "significant factor in the ultimate choice."⁴¹ The ALJ further noted that CCI owned a substantial stock interest in the New York Times Company, which publishes the *New York Times* and has extensive publishing and broadcast holdings. Gardner Cowles, Chairman of CCI, was then a director of the New York Times Company. In addition, certain CCI stockholders had substantial mass media interests. The Des Moines Register and Tribune Company owned 9% of CCI's stock and had an 11% stock interest in the Minneapolis Star and Tribune Company. But the ALJ concluded these related mass media interests were of "little decisional significance" because CCI did not control the New York Times Company, nor did the Des Moines Register and Tribune Company control CCI. Thus, no potential existed for compelling the media involved to "speak with a common voice," and the basic policy underlying the diversification standard was "not disserved."⁴²

The ALJ then concluded that although Central's advantage was "clear," it would not be "compelling" unless Central were shown likely to render public service "at least as good" as that of Cowles.⁴³ This was especially true in the present context where renewal "would not increase the existing concentration of control." The ALJ found that Cowles' incumbency evinced a prior Commission determination that its media connections were not contrary to the public interest. Moreover, the ALJ noted the Commission's reluctance to employ comparative renewal proceedings to restructure the broadcast industry. In his view, the benefits from

⁴¹*Id.*

⁴²*Id.* ¶ 194, J.A. at 134.

⁴³*Id.* ¶ 195, J.A. at 134.

increased diversification had to be balanced against the public necessity of a stable broadcast industry. Accordingly, the ALJ concluded that a comparative renewal hearing should occasion an increase in diversification only if the competing applicant appeared likely to render service at least as good as that which the public had been receiving.

b. Best Practicable Service

Under the criterion of "best practicable service" the ALJ made findings with respect to two matters: (1) Central's proposals regarding the participation of owners in the station management; and (2) the quality of Cowles' past service.

(1) Integration of Ownership and Management

The ALJ found Central's integration proposals to be "very weak," and concluded that Central's owners would probably not play more than a nominal role in station affairs.⁴⁴ He noted full time participation by station owners is of substantial importance under the 1965 criteria. But here, full time participation was proposed by only three of Central's shareholders, collectively owning 10.5% of Central's stock. While "not inconsequential," this ownership interest was not sufficient to control corporate policy. Further, the proposed integration was largely temporary. The important positions of General Manager and Program Director would be held by Mr. Stead and Mrs. Goddard, respectively, but Stead would serve only in Central's "formative stages," and Mrs. Goddard only until the station were "thoroughly organized and stabilized." The ALJ consequently found it unlikely that the benefits of integration would continue throughout the license period. Moreover, the shareholders' lack of broadcast experience, ordinarily unimportant because remediable, became significant in light of the limited tenure contemplated. In sum, the ALJ found that full time integration of management and ownership would be limited to Mr. Chambers, a 3.5% stockholder who would be supervisor of Administra-

⁴⁴*Id.* ¶ 201, J.A. at 136.

tion. His duties were undefined and nothing indicated that he would be involved in determining the nature content of program service.

The ALJ conceded several of Central stockholders would participate in management on a part-time basis, primarily as consultants, but noted that little weight attached to such participation under the *Policy Statement*. In his view, part-time contributions by those who are "essentially dilettantes" rarely has a material effect on overall station operations.

(2) Cowles Past Service

The ALJ found that Cowles' past performance had been "thoroughly acceptable."⁴⁵ He observed that Cowles had developed and presented "a substantial number of program. . . designed to serve the needs and interests of its community." A number of local residents and community leaders had expressed satisfaction with the station's performance, and there had been no complaints concerning the station's operation. Moreover, the ALJ found "no reason to believe that future performance would be less satisfactory." Although the unauthorized move of the main studio warranted a "comparative demerit," since it was not done in bad faith and had not lowered the quality of service to Daytona Beach, it would not support a conclusion that Cowles was unlikely to continue to provide "proper service."⁴⁶

c. *The Public Interest Finding on the Two Standard Comparative Issues*

In the end, the ALJ concluded that Cowles merited a "distinct preference" under the best practicable service criterion and that that preference outweighed Central's preference under the diversification criterion. The ALJ reasoned that absent a showing that the degree of industry concentration which had existed when Cowles was originally licensed

⁴⁵*Id.* ¶ 202, J.A. at 136.

⁴⁶*Id.* ¶ 203, J.A. at 136.

had "actually disserved the public interest," the more compelling objective was obtaining the best practicable service.⁴⁷

B. The Commission Decision.

The Commission affirmed the decision of the ALJ with certain modifications. It concluded that the ALJ had correctly disposed of the main studio issue.⁴⁸ Thus, the Commission rejected both Cowles contention that there had been no *de facto* move of the main studio and Central's argument that the finding without more should have disqualified Cowles. Further, the Commission generally approved the ALJ's treatment of the factors mitigating the effect of the studio move.

The Commission sustained the ALJ again with respect to the mail fraud issue, finding he had properly refused "to impart decisional significance" to the evidence of wrongdoing. Inasmuch as Cowles was not shown to be implicated in the PDS practices and there appeared to be no criminal case against CCI or its personnel, the Commission declined "to attribute the sins of the PDS's to CCI and then visit them on Cowles' head."⁴⁹

Again, by the Commission's reasoning on the two specially designated issues, Cowles lost no ground. The Commission then turned to the two standard issues, diversification and service.

Reviewing the ALJ's treatment of the diversification issue, the Commission affirmed the award of a preference, finding Central's advantage "clear."⁵⁰ The Commission agreed that the significance of the preference was reduced by the fact that

⁴⁷*Id.* ¶ 205, J.A. at 137. The ALJ gave Cowles a "definite plus" for the superiority of its facilities at Orlando. *Id.* ¶ 204, J.A. at 137. This was overturned by the Commission, 60 F.C.C.2d at 416, in light of the impropriety of the *de facto* move which had enhanced those facilities.

⁴⁸60 F.C.C.2d at 398-400.

⁴⁹*Id.* at 405.

⁵⁰*Id.* at 409.

CCI's other broadcast and newspaper interests were remote from Daytona Beach and were not shown to dominate their markets. Moreover, the Commission reiterated its reluctance to use the diversification criterion to restructure the broadcast industry, observing that "the need for industry stability had its own decisional bearing here." In a subsequent order, the Commission expanded its discussion, finding that the autonomy which CCI accorded to the local station management further reduced the significance of Central's preference.⁵¹ Inasmuch as the Commission could find no evidence in the record "that the dangers of concentration. . . exist in this case," the preference was found to be "of little decisional significance."⁵²

The ALJ's conclusions with respect to the best practicable service issue were modified in light of this court's *TV-9* decision⁵³ and the Commission's finding that insufficient

⁵¹62 F.C.C.2d at 956. Central argues that the Commission was without jurisdiction to reconsider *sua sponte* its earlier disposition the comparative issues. Brief of Appellant at 6. We disagree. Commission rules permit it to set aside on its own motion any action within 30 days after release of the order. 47 C.F.R. 1.108 (1977). It is Commission practice that the filing of a petition for reconsideration tolls the running of the thirty day period. See *Radio Americana, Inc.*, 44 F.C.C. 2506, 2510-2511 (1961). See also *Old Belt Broadcasting Corp. (WSWS)*, 44 F.C.C. 1826, 1830 n.3 (1959). We believe it is not unreasonable that where, as here, several petitions are consolidated for hearing and decision, a petition for reconsideration of any of the ensuing orders tolls the thirty day period as to all orders in the case. To find otherwise would often result in anomaly and unfairness. Thus the *sua sponte* reconsiderations were timely in this case. The fact that appeal from the original order had already been brought in this court does not independently preclude reconsideration. See *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 101 U.S. App. D.C. 324, 326-27, 248 F.2d 646, 648-49 (1957).

⁵²62 F.C.C.2d at 957.

⁵³*TV-9, Inc. v. FCC*, 161 U.S. App. D.C., 495 F.2d 929, cert denied, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974). In *TV-9* we held it was erroneous for the Commission to refuse to accord merit to an applicant for the "ownership and participation" of "its two Black stockholders." *Id.* 161 U.S.

weight had attached to Cowles' broadcast record. The Commission held that the minority group participation proposed by Central entitled it to a merit under our *TV-9* decision. Nonetheless, even when considered in conjunction with the merit to which Central was admittedly entitled for integration of ownership and management, the additional merit was not sufficient to outweigh the factors in Cowles' favor under the best practicable service criterion.

Finally, the Commission revised the ALJ's characterization of Cowles' record as "thoroughly acceptable." Finding this phrase "too vague to be meaningful," and not adequately expressing "the outstanding quality of Cowles' past performance," the Commission found that performance to have been "superior" in the sense in which we used the word in our *Citizens* opinion—"justifying a plus of major significance," and inferentially, supporting an expectation of renewal.⁵⁴ In a subsequent order, the Commission clarified its use of the word "superior." It had meant that the level of service provided by Cowles was "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal."⁵⁵ It had not intended to suggest that the performance was exceptional when compared to other stations.

App. D.C. at 361, 495 F.2d at 941 (supplemental opinion). See also *Garret v. FCC*, 168 U.S. App. D.C. 266, 272-73, 513 F.2d 1056, 1062-63 (1975).

In our supplemental opinion in *TV-9*, 161 U.S. App. D.C. at 361, 495 F.2d at 941, we distinguished our use of "merit" from "preference." We explained that the latter term was used "to mean a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns." *Id.* n.2. "'Merit' or 'favorable consideration,'" we said, "is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference." "'Merit,' therefore, is not a 'preference' but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded the preference." *Id.*

⁵⁴60 F.C.C.2d at 421-22.

⁵⁵62 F.C.C.2d at 955.

The Commission thus articulated the final and decisive tally:

The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i.e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.⁵⁶

III. ANALYSIS

[3] The function of this court in reviewing a Commission decision is, as we have often recounted, a fairly limited one. This is particularly the case when the Commission acts under its broad mandate to license in the public interest. However, within the constraints upon our review, we must insist on adherence to those principles which assure the rule of law. Thus we must be satisfied that the agency has given reasoned consideration to all the material facts and issues;⁵⁷ that its findings of fact are supported by substantial evidence;⁵⁸ and that if its notion of the public interest changes, that at least it has not deviated from prior policy without sufficient explanation.⁵⁹ In general, the agency must engage in reasoned decision-making, articulating with some clarity the reasons for

⁵⁶*Id.* at 958.

⁵⁷*See, e.g., Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. at 393, 444 F.2d at 851.

⁵⁸*See, e.g., Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. at 240, 515 F.2d at 699.

⁵⁹*See, e.g., Columbia Broadcasting System, Inc. v. FCC*, 147 U.S. App. D.C. 175, 183, 454 F.2d 1018, 1026 (1971).

its decisions and the significance of facts particularly relied on. Admittedly, this is not an easy matter in comparative renewal proceedings, "but at least so long as the government uses the forms of adjudication, and does not turn, e.g., to bidding, or even chance. . . , reasoned decision-making remains a requirement of our law."⁶⁰

With this preface, we hold that the Commission acted unreasonably and without substantial record support in this matter and we remand for further proceedings.

[4] The Commission's rationale in this case is thoroughly unsatisfying. The Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration and minority participation, and adversely to Cowles on the studio move question. Then simply on the basis of a wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy." Even were we to agree (and we do not agree) with the Commission's trivialization of each of Central's advantages, we still would be unable to sustain its action here. The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on "administrative 'feel.'"⁶¹ Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.

The Commission's treatment of the standard comparative issues—diversification of media ownership and best practicable service—is the most worrisome aspect of this case. The Commission plainly disfavors use of the 1965 criteria in comparative renewal proceedings. This in turn is largely because the Commission dislikes the idea of comparative

⁶⁰*Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. at 394, 444 F.2d at 852 (footnote omitted).

⁶¹60 F.C.C.2d at 422.

renewal proceedings altogether⁶²—or at least those that accord no presumptive weight to incumbency *per se*.⁶³ As long as the renewal hearings were carried on in a completely *ad hoc* manner, it was little noticed that they were not really comparative. But the restatement of the comparative criteria in 1965 imposed an orderliness on the inquiry which made it obvious when applicants were not in fact on an equal footing. This would never have been a problem if the Commission had been able to distinguish in its rules between hearings comparing only new applicants and comparative renewal hearings. This it was unable to do and the *1965 Policy Statement* has since governed comparative renewal proceedings more or less by default.⁶⁴

⁶²Although we would ordinarily be reluctant to reach such conclusions concerning the Commission's state of mind, it has been extraordinarily candid in this matter. See *Report, supra* note 4, 60–81, J.A. at 213 24, concluding, *inter alia*, "that the comparative renewal process should be abolished." *Id.* 61, J.A. at 213. See also *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d at 430, 433 (Chairman Wiley dissenting) ("[T]he 1965 standards concerning diversification and integration advance no public purpose to which agency is truly committed and, if implemented in a rigorous fashion, could well have a serious destabilizing effect on the broadcast industry to the detriment of the . . . public.")

⁶³Some sort of presumption of renewal was implicit in Commission practice at least until the *1965 Policy Statement*. See notes 2 and 17 *supra*. The *1970 Commission Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, supra* note 21, which we struck down in *Citizens Communication Centerv. FCC*, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971), expressly adopted a presumption of renewal if "substantial" past service could be shown. Most proposed legislative reforms would enact some such presumption. See S. 2004, 91st Cong., 1st Sess. (1969) (bill introduced by Senator Pastore and withdrawn when Commission issued its *1970 Policy Statement, supra*); H.R. 13015, § 437(a), 95th Cong., 2d Sess. (1978) ("In any case in which a television broadcasting station submits an application to the Commission for the renewal of a license, the Commission may not consider any competing application for such license in determining whether to renew such license.")

⁶⁴The Commission abandoned its effort to substitute simple quantitative standards for its *ad hoc* inquiry under the 1965 criteria in comparative renewal hearings. See *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 F.C.C.2d 419 (1977), review pending *sub nom. National Black Media Coalition v. FCC*, 191 U.S. App. D.C. 55, 589 F.2d 578 [hereinafter cited as *Formulation of Policies*].

Since the 1965 *Statement* admits little room for a presumption of renewal, the Commission has reconstructed the criteria in a manner creating a *de facto* presumption.⁶⁵ Whether justified in precedent or logic, the process has been straightforward and comports at least formally with the requirement of a "full hearing": (1) the criteria of diversification and integration were converted from structural questions (challengers usually prevailed on the simple numbers) to functional questions regarding the consequences of other media ownership and autonomous management (but challengers could rarely show injury to the public service);⁶⁶ (2) a finding of "substantial," if not above average, past performance by the incumbent would be given decisive weight;⁶⁷ and (3) other

⁶⁵ See, e.g., *id.* at 430:

As illustrated most recently in the Daytona Beach, Florida case [this case], the renewal applicant must, therefore, continue to run on its record, and we believe that that record should be measured by the degree to which the licensee's program performance was sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal. Where the renewal applicant has served the public interest in such a substantial fashion, it will be entitled to the "legitimate renewal expectancy" clearly "implicit in the structure of the [Communications] Act." *Greater Boston Television Corporation v. FCC*, *supra*, 143 U.S. App. D.C. at 396, 444 F.2d at 854. Thereafter, we will direct our attention to the comparative factors set forth in the 1965 *Policy Statement*, *supra*. While that policy statement will otherwise govern the introduction of evidence in the comparative renewal proceeding, the weight to be accorded the legitimate renewal expectancy of the incumbent licensee and the significance of other comparative considerations will depend on the facts of the particular case.

If the reader is unable to distinguish this *modus operandi* from prior instances of a renewal presumption attaching to some measure of substantial service, note 59 *supra*, neither are we.

The Commission elsewhere makes equally erroneous statements of the law, using the language of burden of proof. See 60 F.C.C.2d at 421 ("Central has long known that if it wished to displace Cowles it would have to prove, *inter alia*, that Cowles' past performance was below average.")

⁶⁶ See pp. _____, _____, _____ of 194 U.S. App. D.C., pp. 53-54, 55-56 of 598 F.2d *infra*.

⁶⁷ See pp. _____, _____, _____ of 194 U.S. App. D.C., pp. 56, 58 of 598 F.2d *infra*.

comparative or designated issues favoring the challenger would be noted, but would not be dispositive "even in conjunction with other factors,"⁶⁸ unless pertaining to grievous misconduct by the incumbent.

This usual procedure, we believe, although the Commission nowhere tells us, is essentially what occurred here. The development of Commission policy on comparative renewal hearings has now departed sufficiently from the established law, statutory and judicial precedent, that the Commission's handling of the facts of this case make embarrassingly clear that the FCC has practically erected a presumption of renewal that is inconsistent with the full hearing requirement of § 309(e).

A. The Designated Issues.

1. The Main Studio Move.

[5] The Commission was amply supported in its findings that Cowles moved its main studio from Daytona Beach to Orlando, in violation of FCC regulations. The commission concluded, however, that this violation was mitigated by two factors: (1) the move was not effected in "deliberate defiance" of FCC rules; and (2) Central made no showing that service to Daytona had suffered as a result of the *de facto* move. Consequently, Cowles was given a "slight demerit" for its violation. Apparently even this would overstate the Commission's reaction, for in its original order it appeared to give the violation no weight at all.⁶⁹

⁶⁸ See pp. ____, ____, ____ of 194 U.S. App. D.C., pp. 48-49 of 598 F.2d *supra*.

⁶⁹ The Commission apparently thought the unlawful studio move relevant only to the issue of best practicable service, and having found that the move had not been shown to injure service, concluded that Cowles' distinct preference on the service issue was unimpaired, 60 F.C.C.2d at 422. It is somewhat unclear from the Commission's restatement of the overall balance in its subsequent order whether or not the violation was a demerit *per se*, 62 F.C.C.2d at 952, but it is in any case plain from its earlier discussion of the mitigating factors, see p. ____ of 194 U.S. App. D.C., p. 47 of 598 F.2d and note 48 *supra*, that the violation was given very little weight.

[6] Admittedly, the choice of remedies and sanctions for violations of Commission rules "is a matter wherein the Commission has broad discretion."⁷⁰ Moreover, in exercising that discretion the Commission is free to consider mitigating factors. But the Commission is not free wholly to disregard violations of its rules. Moreover, we find neither of the "mitigating" factors relied on by the Commission in this case to be persuasive.

[7] First, while a showing of harm occasioned by the violation would be relevant to the *severity* of the sanction imposed, the failure to show injury hardly excuses a plain violation. The regulation here involves a presumption that it is bad to have the main studio located—or slyly relocated—other than in the principal community. The rule would be substantially undercut if a party relying on it were forced in each case to show that the move did in fact injure the quality of service.

[8,9] Second, we fail to see how Cowles' violation is "mitigated" by the fact that its conduct may not have been nefarious. Obviously Cowles moved its principal operations little by little; and it is well-settled that people are held to intend the obvious consequences of their acts. Further, Cowles is chargeable with knowledge of the main studio regulation. Thus, we are left with an intentional violation of a Commission rule. Of course, if Cowles had acted in bad faith, that might aggravate its violation; but the mere absence of bad faith cannot mitigate it.

On remand, the Commission should reconsider what weight to accord Cowles' plain violation of an FCC rule.

2. The Mail Fraud Issue.

[10] We have two difficulties with the Commission's treatment of the PDS matter. First, it appears from the record that

⁷⁰*Lorain Journal Co. v. FCC*, 122 U.S. App. D.C. 127, 134, 351 F.2d 824, 831 (1965), *cert. denied*, 383 U.S. 967, 86 S.Ct. 1272, 16 L.Ed.2d 308 (1966). See also *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. at 403, 444 F.2d at 861.

there were at least two persons who were principal officers both of Cowles and of each of the five PDS subsidiaries.⁷¹ *Neither the ALJ nor the Commission made findings concerning these common officers.* In light of this uncontradicted evidence it is plain that the Commission's finding that there was no connection between Cowles and the PDS companies apart from common ownership by CCI is unsupportable. On remand the Commission will have to reconsider its findings and, if appropriate, consider the relevance of wrongdoing by a related corporation sharing principal officers with the licensee.

Second, while not unmindful of the time already occupied exploring this matter, we are troubled by appellant's contentions that the inquiry was curtailed in certain material respects. Specifically, Central argues (1) that the ALJ erroneously quashed subpoenas requiring the testimony of the postal inspectors conducting the mail fraud inquiry;⁷² and (2) that it was error not to inquire into proceedings involving similar allegations being conducted by the Federal Trade Commission and various states.⁷³ As we are unable to decide these claims on the record before us, it will be appropriate on remand for the Commission to review the pertinent rulings by

⁷¹Marvin C. Whatmore is the Treasurer of Cowles and the President of CCI. See *Initial Decision* 116, J.A. at 116. The record shows that he is also the Senior Vice President and a Director of Home Reader Service, Inc., J.A. at 708; a Vice President and Treasurer of Mutual Readers League, Inc., J.A. at 744; a Vice President of Home Reference Library, Inc., J.A. at 784; a Vice President, Treasurer, and a Director of Civic Reading Club, Inc., J.A. at 820; and a Vice President and a Director of Educational Book Club, Inc., J.A. at 873.

The record shows that John F. Harding was Secretary of Cowles, and the Executive Vice President and General Counsel of CCI. See *Initial Decision* 116, J.A. at 116. Additionally, he was a Vice President and the Secretary of Home Reader Service, Inc., J.A. at 716; a Vice President and Secretary of Mutual Readers League, Inc., J.A. at 744; a Vice President and Secretary of Home Reference Library, Inc., J.A. at 784; a Vice President, Secretary and a Director of Civic Reading Club, Inc., J.A. at 820, 823; and a Vice President, Secretary and a Director of Educational Books Club, Inc., J.A. at 873, 876.

⁷²Brief of Appellant at 22 23.

⁷³*Id.* at 20 21.

the ALJ to determine if any were prejudicial to a full and fair inquiry.

B. Standard Comparative Issues.

1. Diversification.

The effect of the Commission's reconstruction of the diversification criteria is obvious in its belittling of Central's advantage there. Because of its lack of other media interests, as contrasted with those of Cowles, Central was found by the ALJ and the Commission to have a "clear advantage" and was consequently accorded a "clear preference." However, the Commission found that the significance of the "clear preference" was reduced by several factors and that, in the end, the preference was "of little decisional significance."⁷⁴

We fail to see how a "clear preference" on a matter which the Commission itself has called a "factor of primary significance" can fairly be of "little decisional significance." We should have thought the relevance of unconcentrated media ownership to the public interest inquiry was well-settled. We said—and rather plainly said—in *Citizens* that:

the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.⁷⁵

In light of this the Commission itself has stated "whatever policy is developed [in the future] will take into account diversification as a factor that must be considered in a comparative renewal hearing."⁷⁶ Nor, as we have noted, does the

⁷⁴62 F.C.C.2d at 957.

⁷⁵*Citizens Communication Center v. FCC*, 145 U.S. App. D.C. at 44 n.36, 447 F.2d at 1213 n.36.

⁷⁶*Second Report and Order on Multiple Ownership*, 50 F.C.C.2d 1046, 1088, amended upon reconsideration, 53 F.C.C.2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978).

Commission in this case purport to disregard the diversification factor. It merely found the applicants' clear difference uninteresting as there was no showing "that the dangers of concentration. . . exist in this case."⁷⁷

Apart from the obvious unfairness of placing this novel burden on Central without fair notice, the question arises whether this has not seriously undercut the utility of the diversification criterion. The brief answer must be that it has.

There is *some* support for the relevance of the factors on which the Commission relied. The *1965 Policy Statement* did say that related media interests within the service area were usually *more* important than more distant interests.⁷⁸ It did not nearly say that interests outside the service area were unimportant. In fact, the fairer inference, and the one more consistent with other Commission policy,⁷⁹ is that related

⁷⁷62 F.C.C.2d at 957. In setting aside the Commission's disposition of the diversification issue, we have taken the Commission's assumption as our own that the matter *is* relevant to a comparative renewal inquiry. See 62 F.C.C.2d at 956-57; 60 F.C.C.2d at 422; note 76 *supra*; cf. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 803, 98 S.Ct. at 2116. We thus confine our objections to the *manner* in which the Commission analyzed the concededly relevant factor, not intending to prescribe the weight which the Commission generally should accord media concentration in the context of comparative renewal hearings. See *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 803, 807, 98 S.Ct. at 2116, 2118.

⁷⁸There the Commission said that the media interests were to be considered in light of the following schedule:

Other interests in the principal community proposed to be served will normally be of most significance, followed by other media interests in the remainder of the proposed service area and, finally, generally in the United States.

1 F.C.C.2d at 394-95 (1965).

⁷⁹See *Multiple Ownership of AM, FM, and Television Broadcast Stations*, 18 F.C.C. 288 (1953). These regulations limited each person to a total of seven AM radio stations, seven FM radio stations, and five VHF television stations anywhere in the United States. They were upheld in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). Of course, it is strongly arguable that rule-making is preferable to *ad hoc* license renewal proceedings as an occasion for restructuring the broadcast industry, see *Report, supra* note 4, 65, J.App. at 214-15, but so long as the Commission purports to be relying on diversification as a material factor in renewal hearings, it must do so in a reasonable manner. See p. ____ of 194 U.S. App. D.C., p. 54 of 598 F.2d *infra*.

media interests anywhere in the nation are quite material.

More troubling still is the Commission's reliance on the autonomy which CCI accorded the local management of Cowles. This, in conjunction with the "remoteness" of CCI's other media interests, led the Commission to conclude that there had been "no adverse effect upon the flow of information to those persons in WESH TV's service area." Further:

We can find no evidence in the record that the dangers of concentration, which we have characterized as any national or other uniform expression of political, economic, or social opinion, exist in this case.⁸⁰

The theory that management autonomy may satisfy the function of diversification was wholly novel when presented to this court in *Fidelity Television, Inc., v. FCC*. There we were faced with a "nothing" applicant "who offers little more and is likely in fact to provide somewhat less than the incumbent."⁸¹ We held that the FCC had not acted unlawfully in finding that local autonomy met the objectives of diversification "sufficiently to withstand the competition of a 'nothing' competitor."⁸² Whether it would have been more appropriate in *Fidelity* to concede the challenger's advantage under diversification but to conclude that that need not carry the day, is not now before us.

In any case we are reluctant to expand the relevance of local autonomy much beyond the facts of *Fidelity* for two reasons. First, the prospect of inquiry into the content of programming as would be entailed in defining "uniform expression" raises serious First Amendment questions.⁸³ In-

⁸⁰62 F.C.C.2d at 957.

⁸¹*Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. at 245, 515 F.2d at 704.

⁸²*Id.* 169 U.S. App. D.C. at 246, 515 F.2d at 705.

⁸³*See id.* 169 U.S. App. D.C. at 246, 257, 515 F.2d at 705, 716 (Bazelon, C. J.) (voting to grant rehearing en banc). *See also Alianza Federal de Mercedes v. FCC*, 176 U.S. App. D.C. 253, 257, 539 F.2d 732, 736 (1976).

deed, the Commission was sensitive to the threat of just such intrusions when it declined to employ quantitative program standards in comparative renewal hearings.⁸⁴ Second, to require a showing of the "dangers of concentration" in each case would remove the customary presumption on which the structural approach to increasing ownership diversification has rested. Given the likely difficulties of proof in such matters, widespread reliance on the autonomy excuse would effectively repeal the diversification criterion.

[11] Summarizing, we conclude that inasmuch as the Commission correctly found that Central's advantage was "clear," it was unreasonable then to accord the diversification finding "little decisional significance." On remand, it will be appropriate for the Commission to reconsider its conclusions in light of the following: (1) the conceded relevance of diversification of media ownership in the comparative renewal context; (2) the materiality of related media interests *anywhere in the nation*; and (3) the evident hazards of relying on local management autonomy as a surrogate for diversification of media ownership.

2. Best Practicable Service.

Whatever weight the Commission may have given to Central's advantages under the integration and minority participation criteria, it was not enough to "outweigh" Cowles' unexceptional record. This puzzling result appears more bizarre as it is thought about. First we note there was no direct inquiry into whether Central's proposed service would be "superior" or even just "substantial." The Commission rejected that question as too speculative, preferring to rely on those structural characteristics identified in the 1965 statement.⁸⁵ These it supposed were less susceptible of puffery

⁸⁴ *Formulation of Policies*, 66 F.C.C.2d at 426, 430.

⁸⁵ See *Initial Decision* 191 92, J.A. at 133. Thus it is Commission practice not to designate an issue pertaining to the challenging applicant's proposed programming unless the challenger makes "a prima facie showing that there are significant differences" related to its "ascertainment of community needs." *Chapman Radio and Television Co.*, 7 F.C.C.2d 213, 215 (1967). As was pointed out to us in oral argument, in this case, Central did not request that its programming proposals be designated for hearing.

than representations concerning future programming. That is probably correct. The fly in the analysis is that the Commission judges incumbents largely on the basis of their broadcast record,⁸⁶ to which there will be nothing comparable on the side of a challenger in any case. The "comparison" thus necessarily ends up rather confused. For at the end of a hearing the Commission is left on the one hand with a series of comparative findings pertaining to integration, etc., and on the other hand with a wholly incommensurable and noncomparative finding about the incumbent's past performance. Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be. But findings on integration and minority participation are evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger.*

[12] In a comparative inquiry evidence of past performance is ordinarily relevant only insofar as it predicts whether future performance will be better or worse than that of competing applicants.⁸⁷ The Commission nowhere articulated

⁸⁶At the time of the Initial Decision, the renewal applicants' past broadcast record was the exclusive basis for predicting its future performance. See *Initial Decision* 191, J.A. at 133; *Wadeco, Inc.*, 41 F.C.C.2d 251 (1973). The Commission changed its position prior to its decision in this case; although still according primary weight to the renewal applicant's past record, it will also consider other comparative criteria under the 1965 statement in comparing a renewal applicant and a new applicant. See *Belo Broadcasting Corp.*, 47 F.C.C.2d 540 (1974). In light of the altered practice, the Commission made its own findings regarding Cowles' "integration proposals," 60 F.C.C.2d at 416.

⁸⁷Although this proposition is hardly apparent from Commission renewal practice, see e.g., 62 F.C.C.2d at 958 ("[W]e make clear that a substantial performance—i.e. sound, favorable—is entitled to legitimate renewal expectancies."), we believe that it fairly states the relevance of past performance. Admittedly this more limited relevance will remit the Commission to those 1965 comparative criteria which it finds distasteful in the renewal context. See note 58 *supra*. Absent statutory amendment, see note 59 *supra*, or promulgation of other comparative criteria, e.g., *Formulation of Policies*, 66 F.C.C.2d at 433, 438 (separate statement of Commissioners Hooks and Fogarty), we see no lawful alternative.

how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's.⁸⁸ In fact, as we have noted, *Central prevailed on each of the questions supposedly predicting which applicant would better perform*—the same criteria the Commission uses for this purpose in nonrenewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practicable service.

In light of this we leave to conjecture what leap of faith would be required to find that Cowles prevailed in the overall inquiry. On remand, the Commission will have to reconsider its manner of deriving a preference under the best practicable service criterion, and if appropriate, how such a preference should be balanced against other factors in the more general public interest inquiry. To avoid, if possible, further appeal in this case, we address ourselves to more specific objections to the disposition of the best practicable service question.

a. *Integration*

We confess we were unable to make sense of the Commission's treatment of the integration issue, though we will reconstruct its language. The ALJ found that Central's integration proposals were "very weak." The Commission agreed, although it found Central's showing "somewhat stronger than that of Cowles." The Commission then noted that the ALJ's findings should be amended in light of this court's intervening *TV-9* decision; it thus gave Central a "merit" for its proposed black participation. Pre-figuring the outcome, the Commission said that the "merit" and "slight preference" (for integration) were insufficient to outweigh the factors in Cowles' favor under the best practicable service criterion. Oddly, four paragraphs later the Commission rethought the integration matter and decided the "neither is entitled to a preference"—not even a slight one—though Central was

⁸⁸ *Fidelity Television*, 169 U.S. App. D.C. at 230 n.3, 515 F.2d at 689 n.3. See also 47 C.F.R. §§ 0.281(a), 1.561, 1.562, and 1.591 (1977).

entitled to a "merit."⁸⁹ Odder still, this "merit" (distinct from the *TV-9* merit) is never heard of again.⁹⁰

More troubling is the manner by which Central's integration "preference" became a "merit." In a way wholly analogous to the diversification question, the Commission replaced the customary integration criterion (under which Cowles fared miserably, being absentee-owned by CCI) with a functional inquiry into whether management autonomy had been an adequate surrogate for owner-management.⁹¹ Unsurprisingly, the Commission concluded that on this record it had. This permitted it to conclude "that the integration proposals of both applicants are substantially similar."⁹² Mildly put, this finding is incredible if anything remains of the customary integration criterion.

[13] This further repeal of the 1965 standards again derives some support from our opinion in *Fidelity*.⁹³ Like the reconstructed diversification analysis, the notion of functional integration was novel when presented in that case, and we have already recounted the special circumstances presented there. It may well have seemed, recalling the court's characterization of *Fidelity* as a "nothing" applicant, that the modifications of the 1965 criteria left the substance of the comparative hearing unimpaired. On the facts of this case, the same cannot be said. The Commission's treatment of the

⁸⁹60 F.C.C.2d at 416.

⁹⁰Leading the cynical to suggest that the only difference between a "preference" and a "merit" is that the latter may be misplaced without embarrassment.

⁹¹60 F.C.C.2d at 415, 416. In finding this ersatz integration enhanced by local management's civic interests, the Commission seems to be running headlong into itself, see *Lorain Community Broadcasting Co.*, 13 F.C.C.2d 106, 109-10 (Rev. Bd. 1968); *Report*, *supra* note 4, ¶ 25, J.A. at 189, although to be sure it has done so before with this court's pardon. See *Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. at 242, 515 F.2d at 701.

⁹²60 F.C.C.2d at 416.

⁹³*Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. at 241-42, 515 F.2d at 700-01.

integration criterion, in light of its treatment of diversification and Cowles' past performance, has denied Central the substance of its right to a full hearing, and is *ipso facto* unreasonable. The Commission may not, comfortably with the hearing mandate of § 309(e), practically abandon the 1965 criteria without providing an alternate scheme affording a thorough and intelligible comparison. On remand, the Commission will have occasion to reconsider its findings on the integration issue.

b. Cowles' Past Performance

[14] For anyone who remained hopeful that Central's now-shrunk advantages would carry the day, the treatment of Cowles' past performance was plainly the *coup de grace*. The Commission recharacterized as "superior" the record which the ALJ had found "thoroughly acceptable." Evidently, the Commission felt that a recitation of the idiom in *Citizens* would permit it to recognize Cowles' "renewal expectancy." If that were correct, we might be more inclined to resist the Commission's characterization.⁹⁴ However, a

⁹⁴Chairman Wiley was similarly skeptical about the "superiority" of Cowles' performance. Dissenting from the commission's first order, 60 F.C.C.2d at 430, the Chairman concluded that Cowles' "thoroughly acceptable" performance was "insufficient to offset [its] disadvantage under the other comparative criteria." *Id.* at 431. Then in light of the Commission's subsequent opinion, Chairman Wiley concurred in the renewal, predicated now on a more modest characterization of Cowles' performance:

In its original opinion, the majority adopted the requirement of "superior service" as set forth in dictum in *Citizens Communication Center v. FCC*. I dissented to this determination on the grounds that WESH-TV's service, while "thoroughly adequate" so as to justify renewal under any rational renewal system, was simply not "superior." On reconsideration, the majority now articulates the required standard of service as "solid and favorable" (as opposed to superior in terms of exceptional or of the highest possible level).

As indicated, *I did not—and do not now—find Cowles' service to be superior (in the sense of exceptional)*. However, *I did—and do now—find that service to be sufficiently substantial (in the sense of solid and favorable) to warrant renewal*. Accordingly, given the majority's clarification of intent, I find myself able to concur in this matter.

62 F.C.C.2d at 958–59 (emphasis added). Although the Commission majority in its clarification, did not expressly find that Cowles' performance was *not* superior, it did decline to find that it was superior in the sense of being exceptional. 62 F.C.C.2d at 956. It being conceded that Cowles' record was not exceptional, we have no quarrel with the Commission's assessment, which is amply supported. See 60 F.C.C.2d at 421.

finding of "superior" service is not an end to the inquiry; it is rather, as we stated in *Citizens*, a "plus of major significance" to be factored into the comparative analysis. In its reconsideration, the Commission resisted general use of the word "superior" preferring the word "substantial" to describe records such as Cowles'. This the Commission felt would not "convey the impression that. . .past programming was exceptional when compared to other broadcast stations in service area or elsewhere."⁹⁵ If by this the Commission means either (1) that "substantial" service will justify renewal *more or less* without regard to comparative issues;⁹⁶ or (2) that "substantial" performance which is not above the average is entitled to "a plus of major significance,"⁹⁷ it is plainly mistaken. We emphasize that lawful renewal expectancies are confined to the likelihood that an incumbent will prevail in a

⁹⁵62 F.C.C.2d at 956.

⁹⁶This inference is inescapable in light of the Commission's numerous statements in this case, e.g., 60 F.C.C.2d at 421-22; 62 F.C.C.2d at 956, 958; and elsewhere. E.g., *Formulation of Policies*, 66 F.C.C.2d at 430.

The Commission is not unwitting of its error. It has recently recalled (not in a renewal proceeding to be sure) that this court has proscribed just such noncomparative renewal decisions. See *Report*, *supra* note 4, 79, J.A. at 222.

⁹⁷As the Commission finds substantial service, without more, to be dispositive, it has no occasion to make the somewhat less erroneous desive weight. We have previously described the quality of performance entitled to "a plus of major significance:"

We used the word "superior" in its ordinary dictionary meaning: "far above the average," Webster's New World Dictionary 1463 (college ed. 1968). And we suggested specific criteria for use in determining whether an incumbent had performed in a "superior" manner, including (1) elimination of excessive and loud advertising; (2) delivery of quality programs; (3) the extent to which the incumbent has reinvested the profit from his license to the service of the viewing and listening public; (4) diversification of ownership of mass media; and (5) independence from governmental influence in promoting First Amendment objectives.

Citizens Communication Center v. FCC, 149 U.S. App. D.C. 419, 420, 463 F.2d 822, 823 (1972), *clarifying Citizens Communication Center*, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971). Because the Commission did not purport to find Cowles' performance superior, see note 90 *supra*, we have no occasion to review its conformance with our second *Citizens* opinion.

fully comparative inquiry. "Superior" or above average past performance is, of course, highly relevant to the comparison, and might be expected to prevail absent some clear and strong showing by the challenger under the comparative factors (either affirmative bearing on the challenger's projected program performance, or negative regarding the incumbent's media ties or perhaps discovered character deficiencies) or other designated issues.⁹⁸ But we do not see how performance that is merely average, whether "solid" or not, can warrant renewal or, in fact, be of especial relevance without some finding that the challenger's performance would likely be no more satisfactory.⁹⁹

On remand, the Commission will have occasion to reconsider its characterization of Cowles' past performance and to articulate clearly the manner in which its findings are integrated into the comparative analysis.

IV. CONCLUSION

We remand this case in light of our abiding convicting that the Commission's order is unsupported by the record and the prior law on which it purported to rely. We are especially troubled by the possibility that settled principles of administrative practice may be ignored because of the Commission's insecurity or unhappiness with the substance of the regulatory regime it is charged to enforce. Nothing would be more demoralizing or unsettling of expectations than for drifting administrative adjudications quietly to erode the statutory mandate of the Commission and judicial precedent.

Orders vacated and case remanded for proceedings consistent with this opinion.

⁹⁸See *Citizens Communication Center v. FCC*, 145 U.S. App. D.C. at 44, 447 F.2d at 1213.

⁹⁹This case does not raise the question whether, between equally qualified applicants, the renewal applicant lawfully may be preferred on the basis of a renewal expectancy. *E.g.*, *Fidelity Television, Inc. v. FCC*, 169 U.S. App. D.C. at 243, 515 F.2d at 702. We contemplate that such instances of equipoise will be exceedingly rare if the Commission seriously undertakes a full comparison.

On Petition for Rehearing

PER CURIAM.

[15] The FCC and intervenors in this matter seek a rehearing, complaining *inter alia* that our opinion disregards the "legitimate renewal expectancies implicit in the structure of the [Communications] Act."¹ In light of the ambiguity of the phrase "renewal expectancies" and the frequency with which they are asserted to insulate an incumbent from license challenge, we think some clarification is called for, both generally and insofar as such an expectation may have been undercut in this case.

The content of the comparative proceeding at issue was governed by the Commission's 1965 Policy Statement;² however, the weight to be given findings under the various criteria was, as in all *renewal* proceedings, dependent upon the particular facts of the case.³ The Commission renewed the incumbent's license after a hearing. It summarized as follows its rationale for doing so:

Our conclusions in this regard do not mean—or suggest—that a challenger is denied an opportunity to show that a grant of his application will better serve the public interest. They do mean that a challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent. The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i.e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Cen-

¹FCC Petition for Rehearing at 9 (citing *Greater Boston*, 143 U.S. App. D.C. at 396, 444 F.2d at 854).

²1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

³See *Central Florida Enterprises, Inc.*, 194 U.S. App. D.C. at 598 F.2d 37 at 42 (1978); *Seven (7) League Productions, Inc.*, 1 F.C.C.2d 1597, 1598 (1965); see also *Belo Broadcasting Corp.*, 47 F.C.C.2d 540, 543—44 (1974).

tral's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.⁴

We set aside the renewal. Our principal reason for doing so was that the Commission's manner of "balancing" its findings was wholly unintelligible,⁵ based, it was said, on "administrative 'feel' " ⁶ Admittedly, licensing in the public interest entails a good many discretionary choices, but even if some of them rest inescapably on agency intuition (not a comfortable idea),⁷ we may at least insist that they do not contradict whatever rules for choosing do exist. We think it plain that the Commission violated the rules. In our opinion we observed:

the Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration, and minority

⁴62 F.C.C.2d at 958 (emphasis original).

⁵194 U.S. App. D.C. at —, 598 F.2d at 50.

⁶60 F.C.C.2d at 422.

⁷As Judge Leventhal said, dissenting to an affirmance of an FCC comparative hearing award in *Star Television, Inc. v. FCC*, 135 U.S. App. D.C. 71, 79, 80, 416 F.2d 1086, 1089, 1094-95, *cert. denied*, 396 U.S. 888, 90 S.Ct. 171, 24 L.Ed.2d 163 (1969):

I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to 'demerits' in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes concerning intuition that outruns analysis. The possibility that an agency may come to the point of resting on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise.

participation, and adversely to Cowles on the studio move question. Then simply on the basis of a wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy."⁸

The dispositive question is, of course, the relevance of the incumbent's past performance. We thought it relevant "only insofar as it predicts whether future performance will be better or worse than that of competing applicants."⁹ From much of the Commission's language (apart from its holding), it appeared to agree.¹⁰ We understand, of course, that it does not.¹¹ If we were correct, the Commission's decision cannot stand, for as we noted:

Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be. But findings on integration and minority participation are evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger.*

*... The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's. In fact, as we have noted, Central prevailed on each of the questions supposedly predicting which applicant would better perform—the same criteria the Commission uses for this purpose in non-renewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practical service.*¹²

However, there is the possibility that an incumbent's meritorious record had literally untold significance. *If it were given enough weight* (entirely apart from predicting the fu-

⁸194 U.S. App. D.C. at —, 598 F.2d at 49.

⁹194 U.S. App. D.C. at —, 598 F.2d at 55.

¹⁰*See, e.g.*, 62 F.C.C.2d at 958 ("[A] challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent.") (emphasis original).

¹¹*See* FCC Petition for Rehearing at 7.

¹²194 U.S. App. D.C. at —, —, 598 F.2d at 55 (emphasis original).

ture), as, for example, to assure industry stability, *the incumbent could conceivably prevail even were the challenger otherwise thought the better applicant.* There are probably many policies, more or less inferable from the "public interest," which might be balanced together with the predicted quality of programming.¹³ We understand the Commission, in pressing renewal expectancies, to be concerned with the disincentive effects of uncertainty. It argues in its petition for rehearing:

Moreover, under the panel's ruling, substantially-performing incumbents are deprived of the "renewal expectancies" which the Court in *Greater Boston* viewed as "ordinary," "legitimate," and "implicit in the structure of the Act." As the Court there explained, "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." Pursuant to these expectancies a "substantial" or "meritorious" past record is a relevant factor to be weighed in the incumbent's favor. In this sense, a "meritorious" past record deserves appropriate weight in the overall "public interest" determination, irrespective of the predictive value of past performance and, contrary to the panel's view (194 U.S. App. D.C. at —, 598 F.2d at 57), *irrespective of any finding concerning the challenger's likely future per-*

This, we admit, appears at least a plausible construction of the "public interest."

The trouble is, apart from several unenlightening recitals that there are expectations implicit in the Act, *there were few intimations that this was the Commission's inchoate ra-*

¹³Diffusion of media ownership is in some sense such a policy.

¹⁴FCC Petition for Rehearing at 7 (footnotes omitted).

tionale.¹⁵ Of course, even had we guessed, we could not have sustained the Commission by further speculating about the weight constructively given the incumbent's past performance.¹⁶ Nor may we review a rationale presented for the first time in this court.¹⁷ *The place for a new rationale in this case, if one is to be logically developed, is on remand.* Moreover, if through rule-making or adjudication the Commission decides to accord weight to such non-comparative values as industry stability, it will have to do so in a manner that is susceptible of judicial review.¹⁸ This would seem to require

¹⁵ See, e.g., 60 F.C.C.2d at 422; 62 F.C.C.2d at 958. The FCC also suggests in its Petition for Rehearing, at 6, that our opinion precludes it from taking account of the natural "credibility" of even an "average incumbent's" proposals derived from the "common sense logic that substantial past performance is the most dependable indicator of substantial future performance." This is incorrect. We said "we do not see how performance that is merely average, whether 'solid' or not, can warrant renewal or, in fact, be of especial relevance without some finding that the challenger's performance would likely be no more satisfactory." 194 U.S. App. D.C. at —, 598 F.2d at 57. We plainly contemplated that the Commission would consider the likelihood of applicants effecting their proposals, as would be only sensible.

¹⁶ Thus, conclusory references to the need for industry stability are hardly a substitute for the statutorily mandated and particularized balancing.

¹⁷ See *SEC v. Chenery Corp.*, 318 U.S. 80, 87-89, 63 S.Ct. 454, 87 L.Ed. 626 (1943), *United States Lines, Inc. v. Federal Maritime Commission*, 189 U.S. App. D.C. 361 at 376 & n.43, 584 F.2d 519 at 534 & n.43 (1978).

¹⁸ We recall that the Commission's license to define the public interest, although broad, is not unbounded. See *NAACP v. FPC*, 425 U.S. 662, 669, 96 S.Ct. 1806, 1811, 48 L.Ed.2d 284 (1976) ("the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare," instead these words "take meaning from the purposes of the regulatory legislation"). Apart from the obvious limitations imposed by its subject matter, jurisdiction, see *National Organization for Women v. FCC*, 181 U.S. App. D.C. 65, 80, 555 F.2d 1002, 1017 (1977), there may be subtler constraints "implicit in the structure of the Act." The Communications Act is very clear that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1976). The Act's disfavor of vested license rights reflects the need, which has long informed the public interest standard as well, for "diverse and antagonistic sources of information," *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 44 n.36, 447 F.2d 1201, 1213 n.36 (1971). The point at which a renewal expectation would become an impermissible vested property right is a worrisome question about which we intimate no view.

that the Commission describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria. Although mathematical precision is, of course, impossible, something more than the Commission's customary recitals, "completely opaque to judicial review," must be provided. The choice of procedures through which an intelligible analysis could be composed is, as we have said, for the Commission.

Since the FCC petition for rehearing displayed a certain agitated concern that our decision in this case would destroy legitimate renewal expectancies of licensees, with baleful commercial consequences and harm to the general public, we thought it relevant to inquire of the Commission as to just how strong those renewal expectancies have been in the past, based on the action actually taken by the Commission and reviewing court.

The history of comparative renewal proceedings since 1 January 1961 (the date from which the data was requested) discloses that incumbents rarely have lost, and then only because they were disqualified on some noncomparative ground. From 1961 to 1978 the Commission has conducted seventeen comparative television license renewal proceedings, seven of which are still pending.¹⁹ In only two cases did the incumbent lose its license,²⁰ and in *neither* of those cases were the comparative criteria the grounds of decision. In one case the incumbent was disqualified because of its fraudulent

¹⁹Letter of Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of Appeals, District of Columbia Circuit, 11 December 1978.

²⁰This does not include the much-publicized case of WHDH-TV, Boston, Massachusetts, which was treated as though it were a comparative proceeding between "new" applicants. See *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

conduct,²¹ and in the other the incumbent failed to pursue its renewal application, so the challenger won by default.²²

The story is not much different in radio licensing. No license has been denied on a comparative basis.²³

Plainly, incumbents can "expect" in a statistical sense that their license will be renewed. We doubt that any realistic appraisal of the remand in this single case, calling upon the Commission to perform its duty in accord with its own expressed standards, could reasonably create the nervous apprehension among licensees claimed by the Commission. The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good.

²¹*Western Communications, Inc. (KORK-TV), Las Vegas, Nevada*, 59 F.C.C.2d 1441 (1976), *reconsideration denied*, 61 F.C.C.2d 974, *aff'd in part and rev'd and remanded in part sub nom., Las Vegas Broadcasting Co. v. FCC*, Nos. 76 2104 and 76-2124 (D.C. Cir., 26 October 1978) 191 U.S. App. D.C. 71, 589 F.2d 594 (affirming the denial of renewal but reversing the disqualification of the challenger).

²²*Gerico Investment Co.*, 31 F.C.C. 625 (1961).

²³From 1961 to 1978 there were thirty-one comparative radio renewal proceedings, twelve of which are still pending. No incumbent radio licensee has been displaced on the basis of the comparative criteria. Three licensees were disqualified for misconduct, five other renewal applications were dismissed, and the challengers' applications granted. See letters of Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of Appeals, District of Columbia Circuit, 11 and 13 December 1978.

441 U.S. **May 14, 17, 21, 1979**

No. 78-1188. SPICKLER v. BRENGELMANN ET UX., 440 U.S. 971;

No. 78-1225. ETKES v. BARTELL MEDIA CORP. ET AL., 440 U.S. 978;

No. 78-5916. VEAL v. ILLINOIS, *ante*, p. 908;

No. 78-6089. BLANTON v. ENGLE, CORRECTIONAL SUPERINTENDENT, ET AL., 440 U.S. 979;

No. 78-6143. JAWA v. FAYETTEVILLE STATE UNIVERSITY ET AL., 440 U.S. 974;

No. 78-6169. HOHENSEE v. SPADINE, 440 U.S. 974;

No. 78-6190. DELESPINE v. ESTELLE, CORRECTIONS DIRECTOR, 440 U.S. 984;

No. 78-6192. WOOD v. JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL., 440 U.S. 984;

No. 78-6290. ROWAN v. UNITED STATES, 440 U.S. 976; and

No. 78-6348. GORDON v. UNITED STATES, *ante*, p. 912. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 78-5535. BODDE v. TEXAS, 440 U.S. 968. Motion for leave to file petition for rehearing denied.

May 17, 1979

Dismissal Under Rule 60

No. 78-1400. COWLES BROADCASTING, INC., ET AL. v. CENTRAL FLORIDA ENTERPRISES, INC., ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 60.

A-317

May 21, 1979

Dismissal Under Rule 60

No. 78-1300. GENERAL WAREHOUSEMEN &
HELPERS LOCAL 767 v. STANDARD BRANDS, INC.
C. A. 5th Cir. Certiorari dismissed under this Court's Rule
60. Reported below: 579 F.2d 1282.